

Patriarchy, Sexual Freedom, and Gender Equality as Causes of Rape

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I. INTRODUCTION

Feminists' anti-rape campaign, launched in the 1970s, was a part of their more general movement for liberation from patriarchy: male supremacy in legal, political, economic and sexual realms.¹ Rejecting psychologists' characterizations of rapists as mentally ill deviants, feminist rape scholars have described them as mostly normal men, motivated chiefly by a desire to prove their masculinity and to dominate and control women. They rape because they are products of a "rape culture" consisting of patriarchal laws, practices and ideology.² Among many examples, feminists contend that two of the most harmful results of this culture are pornography³ and "victim-blaming."⁴ We will call this narrative the traditional feminist analysis (TFA).

There are wide doctrinal variations among self-identified "feminist" scholars.⁵ Even on the subject of rape, large differences exist in the degrees to which individual authors stress the TFA's propositions. This is especially true of careful social scientists, many of whom endorse some of what we call traditional feminist ideas but not necessarily others. To avoid arbitrary characterizations, we focus

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¹ See generally RUTH ROSEN, *THE WORLD SPLIT OPEN: HOW THE MODERN WOMEN'S MOVEMENT CHANGED AMERICA* 107, 116, 122, 126, 129 (2001).

² E.g., SUSAN BROWNMILLER, *AGAINST OUR WILL: MEN, WOMEN, AND RAPE* 395 (1975) ("But does one need scientific methodology in order to conclude that the anti-female propaganda that permeates our nation's cultural output promotes a climate in which acts of sexual hostility directed against women are not only tolerated but ideologically encouraged?").

³ E.g., *id.* at 390–96.

⁴ See generally David P. Bryden & Sonja Lengnick, *Rape in the Criminal Justice System*, 87 J. CRIM. L. & CRIMINOLOGY 1194, 1195–98 (1997).

⁵ See generally JANET HALLEY, *SPLIT DECISIONS: HOW AND WHY TO TAKE A BREAK FROM FEMINISM* (2006).

more on propositions than on labels for individual authors. As we use the term, the mark of a “traditional feminist” proposition about the causes of rape⁶ is its express or implied emphasis on the criminogenic role of patriarchal culture.⁷ The purpose of this article is to evaluate that emphasis.⁸

The most prominent scholarly critics of the TFA have been evolutionary psychologists, who have attacked feminists’ cultural determinism and their frequent claim that rapists’ motives are predominantly nonsexual. While conceding that culture is an important proximate cause, evolutionary psychologists have stressed their own theories about the “ultimate” evolutionary causes of rape. This controversy has been discussed at length elsewhere, and we will not address it here. For similar reasons, we will devote only a couple of pages to the related subject of rapists’ motives (in the narrow sense of goals). Suffice it to say that in our opinion many feminist thinkers have greatly overestimated the extent to which

⁶ Our article, like most of the literature about rape, focuses on heterosexual rape, with no intention to belittle its homosexual equivalent.

⁷ Examples are legion. *E.g.*, DOROTHY SUE COBBLE, LINDA GORDON & ASTRID HENRY, *FEMINISM UNFINISHED: A SHORT, SURPRISING HISTORY OF AMERICAN WOMEN’S MOVEMENTS* (2014); NICOLA GAVEY, *JUST SEX?: THE CULTURAL SCAFFOLDING OF RAPE* (2005); Peggy Reeves Sanday, *Rape-Free Versus Rape-Prone: How Culture Makes a Difference*, in *EVOLUTION, GENDER AND RAPE* 337 (Cheryl Brown Travis ed., 2003); Catharine A. MacKinnon, *A Sex Equality Approach to Sexual Assault*, in *SEXUALLY COERCIVE BEHAVIOR: UNDERSTANDING AND MANAGEMENT*, ANNALS OF THE NEW YORK ACADEMY OF SCIENCES VOL. 989, 265 (Robert A. Prentky, Eric S. Janus & Michael C. Seto, eds., 2003); Elizabeth Ehrhardt Mustaine & Richard Tewksbury, *Sexual Assault of College Women: A Feminist Interpretation of a Routine Activities Analysis*, 27 *CRIM. JUST. REV.* 89, 90 (2002); Martha R. Burt, *Cultural Myths and Supports for Rape*, 38 *J. PERSONALITY & SOC. PSYCH.* 217 (1980). One branch of feminist analyses has been the idea that rapists’ motives are primarily nonsexual—to express hatred of or to dominate and control women. *See generally* David P. Bryden & Maren M. Grier, *The Search for Rapists’ “Real” Motives*, 101 *J. CRIM. LAW & CRIMINOLOGY* 171, 184–194 (2011). Another branch has maintained that American rape law is riddled with rules that serve male defendants’ interests and reflect men’s incorrect belief that many rape reports are false. *E.g.*, SUSAN ESTRICH, *REAL RAPE* 3, 4, 10, 43 (1987); BROWNMILLER, *supra* note 2, at 387. Several of the rules that early feminists criticized have since been abolished or modified by legislatures and courts, but many additional reforms have been proposed, for example in preliminary drafts of proposed revisions of the Model Penal Code. *See generally* MODEL PENAL CODE: SEXUAL ASSAULT AND RELATED OFFENSES (AM. LAW. INST., Preliminary Draft No. 5 2015). The strong emphasis on the adverse effects of patriarchy is also reflected in the extensive social scientific literature about rapists’ (and men who anonymously admit a willingness to rape if assured that it would not be detected by the authorities) attitudes toward women and rape as well as their endorsement of hypermasculine beliefs. These are of course appropriate subjects of study, but we will suggest that some other types of causal theories have too often been rejected or neglected by rape scholars.

⁸ Some scholars have already done so, but with supporting arguments and evidence that differ so greatly from ours that we have chosen to confine our article to our own theses. *E.g.*, Roy Porter, *Rape: Does It Have a Historical Meaning?*, in *RAPE* 216 (Sylvana Tomaselli & Roy Porter eds., 1986).

rapists have nonsexual goals.⁹ Our present topic—patriarchy’s place among the cultural causes of rape in today’s America—is much broader.

We do not offer an agenda for new public policies. Although several of our ideas may sound unconventional, our purposes are descriptive, not prescriptive; we propose revisions in certain causal explanations of rape, not new reforms to prevent it. One of our theses is that, contrary to the TFA, the causes of rape during the past half-century include desirable social changes that neither should nor can be reversed. As we will explain at the end of the article, we believe that most ideas about the causes of rape provide little or no guidance to those who are considering current proposals to reform rape law.¹⁰

Our discussion will include these issues:

1. Is American culture “patriarchal”?
2. Have patriarchal restrictions on women’s sexual behavior always been harmful to women and beneficial to men?
3. Is patriarchy a cause of our objectification of women and our pornography-tolerant culture?
4. Was the strongly patriarchal Puritan culture more rape-supportive than our own relatively egalitarian culture?
5. Does the routine activity analysis (RAA) of crime offer a better framework for understanding rape’s causes than the traditional feminist analysis?
6. What does “victim-blaming” mean, and when is it wrong?
7. How persuasive is the evidence that male college sports and fraternities are among the causes of a “rape epidemic” in higher education?
8. What is the relationship between understanding the causes of rape and designing reforms of rape law?

⁹ Our views on rapists’ motives are set forth in David P. Bryden & Maren M. Grier, *The Search for Rapists “Real” Motives*, 101 J. CRIM. L. & CRIMINOLOGY 171 (2011). For an introduction to and brief evaluations of the theories about rape offered by evolutionary psychologists, see *id.* at 247–54 and works cited therein at 247, 334. Concerning behavioral genetics, see generally NANCY SEGAL, *ENTWINED LIVES: TWINS AND WHAT THEY TELL US ABOUT HUMAN BEHAVIOR* (2007). Contrary to a popular myth, neither of these lines of genetic research and theory denies the importance of cultural and other environmental proximate causes of rape and other crimes. See, e.g., *id.* at 93–94. For criticisms of cultural determinism, see generally STEVEN PINKER, *THE BLANK SLATE: THE MODERN DENIAL OF HUMAN NATURE* (2002).

¹⁰ The senior author’s views about many of the leading proposed reforms of substantive rape law are described in David P. Bryden, *Redefining Rape*, 3 BUFF. CRIM. L. REV. 317 (2000).

II. THE EFFECTS OF WOMEN'S LIBERATION ON THE INCIDENCE OF RAPE: FINDING A FRAMEWORK FOR ANALYSIS

Virtually every American knows about sexual atrocities against women. The most horrific and highly publicized of these barbaric crimes usually occur in severely patriarchal cultures and in wars led and fought by men. Foreign rapes do not necessarily shed light on rape in America, but we agree with the conventional view that America's culture in the mid-twentieth century was patriarchal and as a result rape-supportive in several significant ways. This conclusion can be defended without relying on dramatic anecdotes, emotional appeals, dogmatic motivational theories, wholesale rejection of genetic theories, or uncritical adherence to the traditional feminist analysis. Since the evidence about social causation is rarely conclusive, some speculation is necessary, but no more so than in most grand theories about historical causes.

Our society is a patriarchy in decline. The women's movement is both a symptom and a cause of that decline. The movement and its anti-rape campaign have led to the abolition or modification of several rules of rape law that used to hamper prosecutors in some common types of acquaintance-rape cases;¹¹ have made much progress toward eliminating husbands' right to sex on demand;¹² have brought women into the criminal justice system as police, prosecutors, and judges; apparently have increased the willingness of rape victims to report the crime;¹³ and

¹¹ We refer here only to those rules that to our knowledge are no longer defended by any legal scholar: husbands' unqualified right to sex on demand; the presumptive admissibility of evidence about the alleged victim's sexual history; the prompt complaint rule; the corroboration requirement; and the cautionary instruction. See generally MODEL PENAL CODE, *supra* note 7, at 177–263; ESTRICH, *supra* note 7. Nearly all scholars would add the requirement that adult victims physically resist their attackers (when they are unarmed acquaintances) to this list, although if applied reasonably it is more defensible than its many critics claim. (Alternative rules are also problematic). See generally Bryden, *supra* note 10, at 355–411. The law concerning non-forcible sexual extortion is still insufficiently protective of victims. *Id.* at 435–56. We will not repeat here the many cogent criticisms of these rules. See generally ESTRICH, *supra* note 7. Suffice it to say that the most plausible explanation for the concurrent existence of so many bad rules concerning evidence in rape cases was the one given by feminists: the legal, political and academic professions were overwhelmingly male and as a result tended to be overly concerned about the danger that innocent men would be convicted of having raped their voluntary female companions. This is not to deny the importance of other factors. See generally Bryden & Lengnick, *supra* note 4, at 1315–27 (1997).

A more difficult question is the extent to which unjustifiable rules of rape law had a significant impact on the rape rate prior to the feminist-inspired reforms. See, e.g., David P. Bryden, *Reason and Guesswork in the Definition of Rape*, 3 BUFF. CRIM. L. REV. 585, 587–92 (2000); Bryden, *Redefining Rape*, *supra* note 10, at 475–79. The most popular reform proposals have been justifiable on grounds of fairness or legal consistency irrespective of their efficacy as deterrents to rape and in facilitating convictions.

¹² See *infra* text accompanying note 27.

¹³ The reporting and prosecution rates for rape are much more complex topics than most rape scholars have acknowledged. See generally Bryden & Lengnick, *supra* note 4, at 1201–54. The notoriously low reporting rate compared to other crimes has not necessarily been primarily due to

have made convictions easier to obtain in consent-defense cases (typically involving acquaintances or intimates).¹⁴ Beyond question, feminists have heightened public awareness that acquaintance rape is a serious crime, not just “sex that got out of hand.” These are major achievements irrespective of their effect on the incidence of rape, which may well have been substantial even if it was not primarily due to the purely legal reforms. Further legal reforms are on the horizon.¹⁵ Although a few of these are highly controversial, most are not.¹⁶ They

distrust of the justice system, even when it was almost totally dominated by males. It is more embarrassing for a victim to submit to a physical examination and to describe the details of her rape than, say, a theft, even when she did nothing that might be considered improper, which is not always the case. From 1973–2000, rape reporting rates rose, especially for non-stranger rapes. ERIC P. BAUMER, TEMPORAL VARIATION IN THE LIKELIHOOD OF POLICE NOTIFICATION BY VICTIMS OF RAPE, 1973–2000 (2004)(report submitted to the National Institute of Justice). During the same period, there was no significant increase in the reporting rate for nonsexual assaults. *Id.* By the early 1990s, the reporting rate for rapes by acquaintances was as high as for rapes by strangers, a most impressive achievement. *Id.* The upward trend in rape reporting may have ended, but that was inevitable at some point. Kimberly Lonsway & Joanne Archambault, *The “Justice Gap” for Sexual Assault Cases: Future Directions for Research and Reform*, 18 VIOLENCE AGAINST WOMEN 145, 148 (2012). Polls of non-reporting victims indicate that their most common stated reasons for failure to report are “personal reasons” and fear of retaliation by the rapist rather than a feeling of hopelessness or a fear of official skepticism. *See generally* Bryden & Lengnick, *supra* note 4, at 1218–30. Nevertheless, it seems likely that the publicity generated by the anti-rape campaign caused the rise in the reporting rate by heightening victims’ assertiveness and sense of solidarity with other potential victims and consequent determination to punish the men who raped them. That motive for reporting would not be reflected in the usual surveys of women who *did not* report the crime and are asked to explain why. *Cf. id.* at 1377–78. Victims who cited “personal reasons” as their motive for not reporting may often have been affected by a sense of privacy, guilt, or shame, or fear of retaliation by the rapist; feminists’ anti-rape publicity, with its emphasis on the ubiquity and severity of the crime, and males’ sole responsibility for it, probably has enhanced the countervailing motives mentioned above.

¹⁴ Conviction-rate data are sometimes misleading, as a rise may be due to prosecutors’ failure to prosecute difficult cases, either to improve their conviction rates or because they are understaffed. But for several decades experienced criminal lawyers have reported that convictions in acquaintance-rape cases are now easier to obtain than they were before the feminists’ anti-rape campaign. *See, e.g.,* JEANNE C. MARSH ET AL., RAPE AND THE LIMITS OF LAW REFORM 44, 54 (1982); Bryden & Lengnick, *supra* note 4, at 1263 (remarks of Linda Fairstein). After studying appellate decisions in rape cases, Stephen Schulhofer concluded that convictions now occur in circumstances where even a decision to prosecute would have been unthinkable 20 years ago.: “[I]n some jurisdictions, courts have moved so far, so fast that the concern about too much success now needs to be taken seriously.” Stephen Schulhofer, *Rape Law Reform circa June 2002: Has the Pendulum Swung Too Far?*, 989 ANN. N.Y. ACAD. SCI. 989, 276–77 (2003). As with increased willingness to report the crime, this change may be due more to improved public attitudes toward rape than to specific law reforms in particular jurisdictions, but on either hypothesis it was due to women’s liberation. Although *convicted* rapists tend to have behaved irrationally, which is often why they were caught and convicted, it seems probable that some more rational *potential* rapists (at least of acquaintances) have been deterred in recent decades by a growing sense that women are standing up for their rights and that officials and the general public support them. *Cf.* RICHARD POSNER, SEX AND REASON 386 (1992) (impulsivity of many imprisoned rapists does not rebut deterability of many officially undetected rapists and potential rapists).

¹⁵ *See generally* MODEL PENAL CODE, *supra* note 7.

should magnify whatever effect the earlier reforms and publicity have had on the incidence of rape rate.

We join other legal scholars in believing that the basic evidentiary reforms for which feminists successfully lobbied in the late twentieth century were justifiable.¹⁷ Like other scholars, we strongly suspect that male lawmakers' adoption of the special evidentiary rules for rape cases was due to unproven and probably unwarranted folklore about the frequency of false rape reports.¹⁸ If so, patriarchal culture is the best explanation. On this fundamental point we differ from most feminist scholars only in noting several nuances that feminists often omit.

First, the difficulties of proving the defendant's guilt in a consent-defense case are often largely due to the prosecution's heavy burden of proof and the absence of an eyewitness or other strongly corroborative evidence.¹⁹ For this reason, the malign practical effects of bad rape-law doctrines may not have been as great as some feminists have assumed. It is also important to mention that some of the unjustifiable rules did not exist during earlier, more patriarchal eras or were never widely adopted.²⁰

There is some evidence that, when trial judges gave them the opportunity to do so, jurors in the 1950s who improperly acquitted rape defendants were willing

¹⁶ The greatest controversy has been about whether to redefine consent to require an "affirmative" (not necessarily verbal) manifestation, eliminating the traditional rule that equates passivity with consent in cases in which the alleged perpetrator was an acquaintance of the victim and no aggravating circumstances (such as the victim's incapacity, physical injuries or use of a weapon by the perpetrator) were present. See, e.g., *State ex rel. M.T.S.*, 609 A.2d 1266 (N.J. 1992).

¹⁷ See generally ESTRICH, *supra* note 7.

¹⁸ See, e.g., CASSIA SPOHN & KATHERINE TELLIS, POLICING AND PROSECUTING SEXUAL ASSAULT 102, 140, 164 (2014); David Lisak et al. *False Allegations of Sexual Assault: An Analysis of Ten Years of Reported Cases*, 16 VIOLENCE AGAINST WOMEN 1318 (2010). For example, the traditional jury instruction that rape accusations are easy to make and difficult to disprove even by an innocent man, while understandable in the days when rapists and other felony defendants had hardly any of the rights that they now possess, and were regularly hanged, had become utterly unwarranted by the mid-twentieth century, when defendants had far more rights and juries' prejudices in acquaintance rape cases were much more likely to favor the defendants than the prosecution. See, e.g., LINDA FAIRSTEIN, SEXUAL VIOLENCE: OUR WAR AGAINST RAPE (1993).

¹⁹ See generally Bryden & Lengnick, *supra* note 4, at 1315–27.

²⁰ The rule requiring a prompt complaint by the alleged rape victim did not exist until it was included in the Model Penal Code; thereafter it was adopted in only six states, all of which later repealed it. WAYNE R. LAFAVE, CRIMINAL LAW § 17.5 (5th ed. 2010). The rule requiring corroboration of the alleged victim's account did not exist at common law. In the 1970s, only seven American jurisdictions required corroboration, while eight others required "only limited corroboration or corroboration only under certain circumstances." *Id.* Although the Model Penal Code included a corroboration requirement, all of the states that had had a general requirement abolished it. *Id.*

to convict them of a lesser crime with a lower maximum sentence.²¹ To the extent that this was a common attitude, the leniency of jurors in rape cases was less extreme than rape scholars have supposed.

Most legal reforms are unknown to the general public, including potential rapists.²² But even though he may know little about rape law in his state, a potential rapist is likely to be at least vaguely aware that accusations of rape are now taken seriously by society. This presumably deters some of the more rational potential rapists. What proportion, nobody knows. Some criminologists believe that the possibility of criminal punishment, sporadic and delayed as it is, does not deter many prospective criminals,²³ but even if this disputed theory is true, imprisonment incapacitates some of the most frequent and violent offenders.

Even if the doctrinal reforms did not have much effect on the incidence of rape,²⁴ and even assuming (unreasonably but for the sake of argument) that future reforms will all be either undesirable or wholly ineffective in reducing the rate of sexual coercion, the historic role of the women's movement in improving official and public attitudes toward women and rape is an ample basis for supposing that women's liberation from patriarchy has helped to prevent many rapes.

Whatever their deterrent effect, some reforms become well known and probably have important educational effects. For example, a high proportion of rapes are by husbands (and other intimate partners) of the victims.²⁵ Marital rape used to be an oxymoronic concept; for thousands of years husbands were legally entitled to sex from their wives and allowed to employ sufficient force to obtain it. In American states, that "marital exemption," though not yet totally abolished, is gradually disappearing.²⁶ Of course, the likelihood that a man will rape his wife is affected by non-legal factors such as his personality and mood and the state of the relationship, but it seems virtually certain that the long-term effect of this legal reform will be to reduce the incidence of forcible sex within marriage. This may

²¹ See HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* 250–51, 253–54 (1966). The same tendency was found to exist in other crimes of violence when the victim had behaved imprudently. *Id.* at 253–54.

²² See generally Bryden, *supra* note 10, at 407.

²³ E.g., MARCUS FELSON & MARY ECKERT, *CRIME AND EVERYDAY LIFE* 8 (5th ed. 2010).

²⁴ See, e.g., Bryden, *Redefining Rape*, *supra* note 4, at 475–79; Bryden, *Reason and Guesswork*, *supra* note 11.

²⁵ Studies have found that "intimate partners" account for a substantial proportion of (perhaps even most) rapes. MICHELLE C. BLACK ET AL., *CTR. FOR DISEASE CONTROL & PREVENTION NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE STUDY* (2010); JENNIFER L. TRUMAN & MICHAEL R. RAND, *BUREAU OF JUSTICE STATISTICS, CRIME VICTIMIZATION, 2009* (2010); JENNIFER L. TRUMAN, *BUREAU OF JUSTICE STATISTICS, CRIMINAL VICTIMIZATION, 2010* (2011). However, the precise estimates vary considerably, and methodological problems should be noted. See Kimberly Lonsway & Joanne Archambault, *The "Justice Gap" for Sexual Assault Cases: Future Directions for Research and Reform*, 18 *VIOLENCE AGAINST WOMEN* 145, 146–48 (2012).

²⁶ See generally MODEL PENAL CODE, *supra* note 7, at 155–62.

not be because most husbands will fear punishment for raping their wives while they are living together; changes in behavior may be due mostly to cultural changes including the law's educational effect. We suspect that to many men the message of the marital exemption was that they were entitled—ethically as well as legally—to resort to some degree of force. The opposite message, we surmise, will help to prevent some unknown proportion of the forcible sex within marriage.

It also seems probable that in patriarchal cultures, wives' economic dependence on their husbands encourages—at some level—the idea that marriage is an exchange in which the woman's loss of sexual autonomy is a fair price for the man's obligations, particularly his duty to support her. To the extent that wives enter the remunerative occupations that women's liberation has made available, this perhaps unconscious rationale for conjugal coercion has been undermined.²⁷

Even aside from its impact on rape law and the justice system, women's liberation may have prevented a perhaps very large number of rapes in various indirect ways. Let a few examples suffice. By a rough analogy to the "broken windows" theory of crime prevention,²⁸ disrespectful treatment of women, ranging from sexist jokes to street harassment, may help to create an environment that encourages more serious offenses such as rape. When a class of people lacks formal and informal means of retaliation against those who display lack of respect for them in many (sometimes individually minor) ways, the effect is to send a message of weakness and inferiority that may encourage potential predators to mistreat them in much more serious ways. If so, the feminist-inspired concepts of sexual harassment and sexist speech may have served to reduce one of the causes of rape. This is not to say that every claim of sexism or harassment is reasonable or that every proposed remedy is just and constitutional. One must distinguish between the infantile radicalism of those college students who want to silence all speech that disturbs them and the legitimate desires of women who wish only to be treated with the same dignity as their male peers.

Even more certainly, improvements in women's wealth and status deriving from educational and occupational integration have enhanced their safety by increasing their residential mobility and men's respect for their potential retaliatory

²⁷ Richard Posner offered seven possible explanations of husbands' traditional right to marital sex, noting that most of them have become obsolete in modern America. POSNER, *supra* note 14, at 388–91.

²⁸ This theory, controversial as applied to African-American neighborhoods, holds that an area full of minor offenses like turnstile-jumping, graffiti, and broken windows, tends to encourage more serious offenses such as theft. The suggested remedy is to curb or remove the effects of the minor offenses. See generally GEORGE L. KELLING & CATHERINE M. COLES, *FIXING BROKEN WINDOWS: RESTORING ORDER AND REDUCING CRIME IN OUR COMMUNITIES* (1996). For an interesting endorsement of a similar approach by a British prime minister, see TONY BLAIR, *A JOURNEY: MY POLITICAL LIFE* 273–74, 278 (2010).

power, while decreasing their financial dependence on violent intimate partners. True, any woman can be raped, but poverty increases the danger.²⁹

Many acquaintance rapes are mismatched wrestling contests. Feminists' emphases on female assertiveness and athleticism, while far from a panacea, may tend to make the outcome of these contests somewhat less certain, thus reducing the likelihood that the more rational (unarmed) potential rapists will try to rape their companions and will succeed when they do.³⁰

Despite these and other arguments to the same effect, we do not believe that in America today the concept of patriarchal culture can carry the explanatory weight that the TFA assigns to it—not even if one ignores genetic causes such as male sexual desire and upper-body strength. Although individual men's propensity to rape correlates with certain "patriarchal" attitudes—a matter that we will discuss—those attitudes are not reflective of our general culture, which is better described as semi-feminist than as patriarchal. While the aggregate economic and political power of men still exceeds that of women, the relative power of feminist and patriarchal elements in our culture varies contextually. On some of the issues of most concern to women, feminist ideas are now dominant, especially in the elite centers of cultural power—the media and the universities. Consider, for example, abortion. Pro-life politicians have many proposals to restrict abortion rights, but pro-choice feminists have won the fundamental legal battles in the Supreme Court, despite its numerical domination by males. In the armed forces, feminists have not yet achieved all of their goals, but qualified women are now entitled to serve in combat, traditionally the ultimate male occupation.³¹ Women achieved this through their voting power in federal elections, despite men's dominance of the Defense Department's leadership, the presidency, and—to a lesser extent—Congress.

In the most relevant contexts—attitudes toward women and rape—our culture has largely rejected patriarchal stereotypes about women's nature, role, and proper behavior. Every two years, the American National Election Studies Opinion Poll has asked respondents whether they believe that women should have an equal role with men in running business, industry and government, or instead felt that a women's place is in the home. By 2004, 78% believed in an equal role, having

²⁹ Laura Dugan & Jennifer L. Castro, *Predictors of Violent Victimization: National Crime Victimization Survey Women and Jailed Women*, in GENDER AND CRIME, PATTERNS OF VICTIMIZATION AND OFFENDING 171, 173 (Karen Heimer & Candace Kruttschnitt eds., 2006).

³⁰ But see Mustaine & Tewksbury, *supra* note 7, at 115 (female college athletes found to be more likely to be victimized than non-athletes, perhaps because they associate more often with male athletes).

³¹ For early reflections on this development, see generally Jenna Grassbaugh, *The Opaque Glass Ceiling: How Will Gender Neutrality in Combat Affect Military Sexual Assault Prevalence, Prevention and Prosecution?* 11 OHIO ST. J. CRIM. L. 319 (2014).

risen from 47% in 1972.³² The difference between male and female respondents in both 1974 and 2004 was very small—a couple of percentage points.³³ Differences in years of education affected the results modestly, but the only group most of whose members did not believe in equality was those with only a grade-school education (38%), far below those with only a high-school education (75%). The latter group had risen greatly, from 42% in 1972, while the grade-school-only respondents had hardly changed from the 34% who supported equality in 1972.

By 2004, majorities of unskilled workers (76%, up from 45%), farmers (54%, up from 31%), and housewives (51 %, up from 37%) had joined the trend in favor of equality.³⁴ This was also true of every age group, political party and political orientation (including “conservative”).³⁵

After studying voters’ attitudes and voting patterns in gubernatorial and congressional elections, Kathleen Dolan recently concluded that “gender stereotypes are not a significant impediment to the success of women candidates.”³⁶ Majorities of survey respondents believed “that there should be more women in elective office than is currently the case, that women are as emotionally well suited to politics as are men, and that more women in office would be a positive for our system.”³⁷ When women lose races against male candidates, the reasons are standard political factors, not their gender: “Voters who share the party of a woman candidate are overwhelmingly likely to vote for her. There is no evidence that people cross party lines to avoid or seek out a woman candidate.”³⁸

³² Catherine I. Bolzendahl & Daniel J. Myers, *Feminist Attitudes and Support for Gender Equality: Opinion Change in Women and Men, 1974–1998*, 83 SOC. FORCES 759, 776 tbl.2 (2004). In 2004, a majority of 57% selected the number one answer, having risen from 31% in 1972. *Id.*

³³ *Equal Role for Women 1972–2008: Percent Among Demographic Groups Who Responded*, AM. NAT’L ELECTION STUDIES, http://www.electionstudies.org/nesguide/2ndtable/t4c_1_1.htm (last visited Mar. 16, 2016).

³⁴ *Id.*

³⁵ The percentages of people who chose to fill out the questionnaire were extremely low and despite their anonymity may have been skewed in favor of politically correct answers. But that in itself would be a sign of growing female power, because the fear of being politically incorrect is a response to cultural power. Even if the figures are inaccurate for any given year, the trend is noteworthy. One need not rely on polls to recognize that the idea that women belong in the home has diminished greatly, and not only at the elite level of our society; we have observed that the standard answer, even among conservative politicians, is that women ought to have a choice. This in itself is a big dent in the idea that our “culture” is “patriarchal;” the division of labor by gender is one of the most characteristic features of patriarchy, and in strongly patriarchal societies men feel no need to defend homemaking as a merely permissible “choice.”

³⁶ KATHLEEN DOLAN, WHEN DOES GENDER MATTER?: WOMEN CANDIDATES AND GENDER STEREOTYPES IN AMERICAN ELECTIONS 188 (2014).

³⁷ *Id.*

³⁸ *Id.* at 192–93.

Everyday observation confirms that some basic characteristics of patriarchy—segregation by gender, assignment of women to domestic duties, and insistence on non-marital female chastity—have largely disappeared in our society. Our point is not that men and women are equal in all respects but that neither feminists nor patriarchal men exercise hegemonic control over American culture.³⁹

Proponents of the TFA tend to ignore or minimize those causes of rape that they regard as either irremediable, desirable despite their adverse effects on rape rates, or potentially useful to political opponents. This is most obvious with respect to biological causes, but with few if any exceptions it is also true of social causes.⁴⁰ Granted, such omissions are sometimes justifiable: naturally, a political activist ignores irremediable causes of social problems, and even a detached scholar sometimes regards a cause as too obvious to mention (otherwise, “selfishness” might be the most common explanation of misbehavior). But we are discussing teaching and scholarship, not political activism,⁴¹ and in other contexts proponents of the TFA do not consistently exclude obvious facts from their arguments: for instance, the fact that men are the ones who rape and women are the usual victims.

The incidence of rape has been found by at least some criminologists to be associated with many societal variables other than the degree of patriarchy.⁴² A short list would include the level of (legitimate or criminal) violence in general;⁴³ consumption of pornography;⁴⁴ urbanization;⁴⁵ the scarcity of males relative to

³⁹ See generally HALLEY, *supra* note 5, at 20–22. Cf. CHRISTINA HOFF SOMMERS, *THE WAR AGAINST BOYS: HOW MISGUIDED FEMINISM IS HARMING OUR YOUNG MEN* (2000). Whether or not one regards this “war” as harmful, it is additional evidence of growing feminist power in our culture.

⁴⁰ War might be considered an exception, but it has been a quintessentially male occupation and consequently can be viewed, albeit sometimes fallaciously, through the lens of the TFA. See generally Bryden & Grier, *supra* note 9, at 190–93. Feminists often mention the association between intoxication and rape but rarely emphasize it as much as ideological causes.

⁴¹ Even for activists, sometimes a policy that is not rape-specific—for example, vigorous enforcement of the civil liquor laws—may be more promising than a rape-specific legal reform.

⁴² See generally MARTIN L. LALUMIÈRE ET AL., *THE CAUSES OF RAPE: UNDERSTANDING INDIVIDUAL DIFFERENCES IN MALE PROPENSITY FOR SEXUAL AGGRESSION* (2005). Although “individual differences” might be interpreted to exclude sociological perspectives, psychology, sociology, and other disciplines overlap when studying crime because some of the individual differences are thought to have societal causes.

⁴³ See generally RICHARD B. FELSON, *VIOLENCE AND GENDER REEXAMINED* 121–200 (2002); LARRY BARON & MURRAY A. STRAUS, *FOUR THEORIES OF RAPE IN AMERICAN SOCIETY: A STATE-LEVEL ANALYSIS* 187 (1989); Peggy Reeves Sanday, *The Socio-Cultural Context of Rape: A Cross-Cultural Study*, 37 J. SOC. ISSUES 5 (1981).

⁴⁴ See generally, LALUMIÈRE ET AL., *supra* note 42, at 146–150. Concerning patriarchy’s role in pornography, see *infra* text accompanying notes 145–48.

⁴⁵ See, e.g., BARON & STRAUS, *supra* note 43, at 36, 48, 173, 182–83, 188, 194–95. This methodology of this study is imperfect, as its authors acknowledge. For example, it does not include comparative data about rates of sexual or nonsexual violence against men, and its findings demonstrate correlations, not necessarily causes. Yet it is superior to many other studies, in scope

females;⁴⁶ other demographic factors, especially the percentage of youths in the population;⁴⁷ alcohol or drug consumption;⁴⁸ “social disorganization;”⁴⁹ general economic conditions;⁵⁰ unemployment;⁵¹ the characteristics and behavior of victims;⁵² and war.⁵³ If one were to include the plausible remote causes of these proximate causes, the list could be lengthened indefinitely. Without considering the degree to which each alleged cause is supported by cogent evidence, it seems clear that while some of them may be due in part to patriarchy, others are associated with its decline or with independent factors. While we feel confident that the anti-rape campaign and women’s general progress have helped to prevent many rapes, their importance relative to all of the other plausible social causes of rape is unknown.⁵⁴

The uncertainties are compounded by two major shortcomings of criminological research. If criminologists agreed about the causes of crime trends,

and often in methodology. For a detailed discussion of the kinds of urban landscapes that facilitate crimes, see generally FELSON & ECKERT, *supra* note 23, at 153–169.

⁴⁶ See generally JON BIRGER, DATE-ONOMICS: HOW DATING BECAME A LOPSIDED NUMBERS GAME (2015). According to studies cited by Birger, an oversupply of women, for example on a college campus, tends to correlate, paradoxically, with both a hookup culture and a high level of sexual violence.

⁴⁷ Cf. LALUMIÈRE ET AL., *supra* note 42, at 85–87 (“Young Male Syndrome”).

⁴⁸ See *infra* text accompanying notes 182–88.

⁴⁹ See, e.g., BARON & STRAUS, *supra* note 43, at 135–145. “Social disorganization theory is based on the idea that the erosion of institutional and informal forces of social control undermines social constraints and frees individuals to engage in nonconforming behavior.” *Id.* at 145. For their interstate comparative analysis of this phenomenon, Baron and Straus employed scales measuring each state’s percentage of the population moving from a different state or abroad; the ratio of tourists to residents; percent divorced of the population; percent of female-headed families with children under age 18; percent of the population with no religious affiliation; and non-familial male householders. *Id.* at 130, tbl.6.1.

⁵⁰ See *infra* text accompanying note 61.

⁵¹ See *infra* text accompanying note 60. Cf. Mustaine & Tewksbury, *supra* note 7, at 115.

⁵² See, e.g., Bryden & Lengnick, *supra* note 4, at 1328–77.

⁵³ The link between war and rape is uncontroversial except with respect to soldier-rapists’ motives. See, e.g., Bryden & Grier, *supra* note 9, at 190–93. The increasing presence of women in our combat units will provide additional potential rape victims but may also serve to prevent (a greater number of) rapes by our troops.

⁵⁴ A few studies provide relevant but disputable evidence. E.g., BARON & STRAUS, *supra* note 43, at 183 n.6: “83% of the variation [in rates of reported rapes among the states] is accounted for by the six variables directly related to the rape rate.” In descending order of magnitude, these were circulation of [soft-core] sex magazines, the level of urbanization, degree of social disorganization, [general] economic inequality, unemployment, and gender inequality. *Id.* The authors concluded that the association with sales of sex magazines was not indicative of a causal relationship, however, making urbanization and social disorganization—rarely if ever mentioned by the supporters of the TFA—the phenomena in their study that were most directly associated with rates of (reported) rapes. On the other hand, the methodology of this study is open to criticism. See *supra* note 46.

they might have at least a starting point for trying to assess the relative causal impact of women's progress (as measured by various legal, economic and political indicia) versus, for example, economic conditions that affect both sexes. Unfortunately, little is known about such matters. For example, despite massive collections of data, criminologists have failed to reach a consensus about the causes of the national decline in the rates of serious crimes that began in the early to mid-1990s and was "larger and longer than any [other] documented decline in the twentieth century."⁵⁵ During the 1990s the homicide rate fell by 39%, while, according to data from household "victim surveys," the declines for other common serious crimes were 65% (rape), 58% (auto theft), 51% (burglary), 48% (larceny) and 42% (assault).⁵⁶ Frank Zimring, a leading criminologist and authority on this decline, believes that "[t]he most important lesson of the 1990s was that major changes in rates of crime can happen without major changes in the social fabric."⁵⁷ He casts doubt on all of the monocausal explanations of the decline: urban disadvantage,⁵⁸ increases in incarceration rates,⁵⁹ unemployment,⁶⁰ the general state of the economy,⁶¹ the proportion of youths in the population,⁶² police tactics and manpower allocations,⁶³ the rise and fall of crack cocaine,⁶⁴ and the legitimization of abortion.⁶⁵ Clearly, says Zimring, multiple causes were involved,⁶⁶ but even on that premise he concedes that he cannot come close to a full explanation of the decline.⁶⁷ Concerning individual crimes such as rape,

⁵⁵ FRANK ZIMRING, *THE GREAT AMERICAN CRIME DECLINE* 196 (2007). The corresponding figures for New York City were uniquely spectacular: homicide fell by 73%, followed by rape (52%), robbery (70%), and aggravated assault (46%). *Id.* at 13 fig.1.7. Meanwhile, some feminists argued that the victim surveys (NCVS) on which criminologists like Zimring relied were inaccurate with respect to rape and maintained that instead of a decline, there was or may have been a national "rape epidemic." DIANA E.H. RUSSELL & REBECCA M. BOLEN, *THE EPIDEMIC OF RAPE AND CHILD SEXUAL ABUSE IN THE UNITES STATES* 123–35 (2000). For our purposes, this dispute is irrelevant because neither side of the trend argument sheds much light on patriarchy's causal role. This dispute illustrates a hidden dilemma for feminist theorists: how to reconcile their continuing description of alarmingly high rape rates with the TFA's implicit claim that progress toward gender equality—which has been great since the 1950's—is the most effective way to reduce the incidence of rape.

⁵⁶ ZIMRING, *supra* note 55, at 8 fig.1.3.

⁵⁷ *Id.* at 206.

⁵⁸ *Id.* at vi.

⁵⁹ *Id.* at 55.

⁶⁰ *Id.* at 64–69.

⁶¹ *Id.* at 63–69.

⁶² *Id.* at 56.

⁶³ *Id.* at 74–76.

⁶⁴ *Id.* at 75.

⁶⁵ *Id.*

⁶⁶ *Id.* at 46, 197.

⁶⁷ *Id.* at 46, 72.

Zimring observes that criminologists' models are even less trustworthy than for crime trends in general.⁶⁸

The other shortcoming of the social scientific literature is that most criminological studies do not include gender inequality as one of the variables, focusing instead on factors like the ones Zimring mentions that are possible causes of many crimes against both sexes.⁶⁹ Mainstream criminologists and proponents of the TFA often ignore each other's claims, even when discussing phenomena that should be of interest to both. They tend to have separate academic constituencies, a result of both ordinary academic parochialism and political correctness.

Another complexity is the distinction between rapes by total strangers to the victim and rapes by unarmed acquaintances (or intimates) who have inflicted no severe physical injury. (Obviously, there are intermediate situations such as a pickup in a bar followed by a rape). Rapes by acquaintances and intimates are much more numerous, but stranger rapes are a significant and terrifying minority.⁷⁰ In cases involving acquaintances or intimates, the defense usually is consent; in total-stranger cases, it is usually misidentification. As Susan Estrich acknowledged, our criminal justice system, even when it was too lenient toward acquaintance rapists, displayed (to put it mildly) no undue sympathy for total-stranger rapists.⁷¹ Although no scholar questions Estrich's point, feminists' references to allegedly rape-supportive features of our culture commonly fail to mention it.⁷²

⁶⁸ *Id.* at 55. But see RUSSELL & BOLEN, *supra* note 55, at 123–29.

⁶⁹ There have been some exceptions. *E.g.*, BARON & STRAUS, *supra* note 43.

⁷⁰ Excluding victims under age twelve, one survey found that 52.5% of female victims of forcible rape or attempted rape identified the perpetrator as an intimate partner, and 33% as an acquaintance. BLACK ET AL., *supra* note 25, at 22 tbl.2.5. Another study found that 21% of female rape victims described the rapist as a stranger, with the rest about equally divided between intimate partners and friends/acquaintances. TRUMAN & RAND, *supra* note 25, at 7 tbl.7. Somewhat different results were reported in another BJS study: TRUMAN, *supra* note 25, at 9 tbl.5 (25% were by strangers; 73% by non-strangers (17% intimates, 8% other relatives and 48% friends/acquaintances)).

⁷¹ ESTRICH, *supra* note 7, at 3–4, 42–43 (males in justice system show no undue leniency toward stranger rapists, those who use weapons, and those involved in “inappropriate” relationships, for instance incest); Bryden & Lengnick, *supra* note 4, at 1255–58, 1267 (discussing study in the 1950s of judge-jury disagreements in rape cases).

⁷² Although stranger rapists have always been feared and detested by nearly all Americans, there is evidence that they tend to be unusually concerned about their masculinity and believers in a macho ideology. This in turn correlates with rape proclivity. *See, e.g.*, Bryden & Grier, *supra* note 7, at 227–30. To the extent that the macho ideology is due to the he-man strand in our culture, one can argue that some features of our culture are indirectly supportive even of stranger rape. This approach raises further questions. Does John Wayne stand for raping women or rather for gallantry (albeit “patriarchal”) toward women and violence only toward evil males? Or do we need another nuance, conceding that to most thoughtful and decent people the latter is the more accurate characterization of most of our culture's masculine idols but arguing that many potential rapists emulate the forceful trait while ignoring the gallantry? Is “patriarchal culture” the cause of that?

The most serious flaw of the TFA is its silence about the rape-supportive features of *women's liberation* (the decline of patriarchy) and the sexual revolution. A cultural feature can be undesirable without being criminogenic, and it can be desirable yet criminogenic. The fact that women's liberation from patriarchy has been just, on the whole socially beneficial, and rape-preventive in several ways, does not mean that its only or even net effect on the incidence of rape has been to reduce it. The assumption, common among passionate advocates of every cause, that desirable changes have no harmful side effects is true neither of our individual nor of our societal lives. Most often, good and bad are interwoven and should be balanced.

There are several reasons for supposing that women's liberation, though it helps to prevent many rapes, also helps to cause many others, mainly by increasing men's and women's social and consequently sexual interactions, including those of potential rapists with women who are vulnerable, for example, because of their personality traits, intoxication or consent to previous sexual activities with the same man. This double effect does not substantially diminish the desirability of women's liberation, including women's equal right to become intoxicated, and the sexual revolution, including women's equal right to engage in casual sex. But it greatly diminishes the cogency of the TFA's explanation of the causes of rape in our society.

Is there another analytical framework that can accommodate the TFA's insights without its faults? One possibility is to combine the feminists' emphasis on rapists' "hostile masculinity" with the evolutionary psychologists' insistence that sexual gratification is rapists' primary goal. Some scholars have made this improvement.⁷³ It eliminates the motivational problem but not the other faults of the TFA.

Another alternative to the TFA, potentially capable of absorbing and supplementing the valid insights of both feminist and evolutionary theories, is what criminologists call the "routine activity" analysis (RAA). Championed by Marcus Felson and a number of other scholars,⁷⁴ the RAA is a general framework for analyzing the causes of crime; unlike the TFA, it is not limited to crimes against women.

Felson and Rachel Boba argue that major changes in crime rates are ultimately due to technological innovations (for example, in transportation) that transform the settings of everyday life with major effects on the incidence of

⁷³ E.g., Neil Malamuth, *An Evolutionary-Based Model Integrating Research on the Characteristics of Sexually Coercive Men*, in *ADVANCES IN PSYCHOLOGICAL SCIENCE: SOCIAL, PERSONAL & CULTURAL ASPECTS* 151 (John G. Adair, David Bélanger & Kenneth L. Dion, eds., 1996).

⁷⁴ The most comprehensive expositions of the theory are by Marcus Felson and his co-authors, of the fourth and fifth editions of *CRIME AND EVERYDAY LIFE*. FELSON & ECKERT, *supra* note 23, and MARCUS FELSON & RACHEL BOBA, *CRIME AND EVERYDAY LIFE* xii, 10 (4th ed. 2010).

crime.⁷⁵ At a more proximate level, say Felson and Boba, every criminal incident is due to the convergence (in space and time) of three essential elements: (1) a likely offender, (2) who has access to what he regards as a suitable target, (3) which or who lacks a capable guardian.⁷⁶ We will discuss these proximate causes.

A “likely offender” is simply someone with a high propensity to commit the precise type of crime in question—for instance, date rape or purse snatching.⁷⁷ Unlike some psychologists and feminists, RAA scholars do not assume that a criminal’s ideology or motive is the master cause of his crime. As a result, they show little interest in the fascinating but difficult to test and generally dogmatic theories about ulterior motives that feminists have so often propounded—for instance, the assertion that a rapist’s real motive was to prove his masculinity.⁷⁸ The routine activity theorists usually refer to criminals’ motives only in passing; they are much more interested in criminals’ access to potential victims and the latter’s vulnerability.⁷⁹ Although devoting much more attention to theft than to violent personal crimes such as rape and nonsexual assaults, RAA scholars apply the same methodology to both types of crime.⁸⁰

Whether the potential offender is a drug dealer, a thief, or a rapist, he can gain access to a potential victim only by escaping supervision by those who can control his conduct; if he is a minor, potential controllers include his parents, who can insist that he do his homework, impose a curfew, refuse his request for use of the family car, and so on.

⁷⁵ FELSON & BOBA, *supra* note 74.

⁷⁶ *Id.* at 28 (“almost always” all three are present).

⁷⁷ See generally LALUMIÈRE ET AL., *supra* note 42.

⁷⁸ Rather, the desired *act and its setting are crucial*. FELSON & BOBA, *supra* note 74, at xi.

⁷⁹ See, e.g., Lawrence E. Cohen & Marcus Felson, *Social Change and Crime Rate Trends: A Routine Activity Approach*, 44 AM. SOC. REV. 588, 599 (1979) (theft rates rose after manufacturers made lighter television sets). Countless other examples can be cited. On a street with few pedestrians (a routine activity) a robber can pick off a straggler more easily than on a busy street. FELSON & BOBA, *supra* note 74, at 26. “A suitable target is any person or thing that draws the offender toward a crime, whether a car that invites him to steal it, some money that he could easily take, somebody who provokes him into a fight, or somebody who looks like an easy purse snatch.” *Id.* at 31. “The most significant guardians in society are ordinary citizens going about their daily routines. Usually you are the best guardian for your own property. Your friends and relatives can serve as guardians for you and your property, as you can for theirs. Even strangers can serve as guardians if they are nearby, and a potential offender thinks that they might interfere or turn him in or otherwise interfere with his plans.” *Id.* Thus, a third-party “guardian” can be “anyone whose mere presence serves as a gentle reminder that someone is looking.” *Id.* *Mutatis mutandis*, the same propositions apply to rape.

⁸⁰ For example, “[r]apists normally are attracted to victims of younger ages, reflecting their pursuit of pleasure.” *Id.* at 44. This is contrary to the nonsexual motivational theories favored by many feminists, which would lead one to predict that rapists would ignore their victims’ ages. See generally Bryden & Grier, *supra* note 7, at 207–209.

Many others have the power to impede or facilitate potential criminals' access to potential victims. Suppose, for example, that a bar is adjacent to an alley that provides a shortcut to a bus stop.⁸¹ The alley is screened from the street by bushes and trees. Like other features of some urban spaces, this is a potentially criminogenic environment.⁸² In addition, suppose that the bartender fails to comply with the local law prohibiting him from serving underage or inebriated customers. After closing time, a couple of drunken underage males leave the bar and lurk in the alley behind it, ambushing a female customer as she passes on the way to her bus stop. Let us further suppose that, for whatever reason, the boys' parents (or single parent) failed in some way to exercise sufficient control over their children's activities on that night and perhaps habitually. The boys may rob or rape the woman; in either case, several people facilitated their access to her.

By taking the shortcut instead of walking with the group of pedestrians taking a slightly longer but more publicly visible route, the victim herself also made the crime more likely. If she was drunk, that too may have increased her vulnerability. Routine activity theorists often note male, female, and corporate victims' contributions to their own victimization, but not on an individual basis and without moral overtones or indications of sympathy for the criminals.

Examining victims' roles in causing crimes such as theft and murder is not controversial, but when the crime in question is rape, feminists often dismiss discussions of the victims' character, lifestyle or behavior shortly before the rape as "victim-blaming." Their fears are understandable. If a victim of burglary left her \$200,000 necklace in plain view no one will suggest that the burglar should be acquitted. But in some acquaintance-rape cases some jurors will vote to acquit a defendant whose victim was imprudent, for instance, by dressing or behaving in what they regard as a sexually provocative way: "She was asking for it."⁸³ At some point, of course, a woman's imprudent behavior may justify a mistake about her consent, but her negligence, as such, is not and should not be a defense to rape or any other intentional crime.⁸⁴ To be sure, rape differs from most other crimes in that some victims arouse more or less reasonable expectations and passions that they then fail to satisfy, but even when the victim is exceptionally blameworthy for this the rapist's moral guilt and dangerousness usually warrant a criminal penalty.

Quite apart from whether it leads to an unjustifiable acquittal, criticism of an individual rape victim is often tactless, unnecessary and even cruel. But it can be motivated by a concern for her future safety and, depending on the circumstances and the speaker, it is not always improper—for example, when a teenager's parents, at some appropriate time, tell her (or an advisor urges her) to stop associating with a group of delinquent boys, one of whom recently raped her.

⁸¹ This hypothetical case is based on examples in FELSON & BOBA, *supra* note 74, at 26, 31.

⁸² *See id.* at 147–73.

⁸³ *See* Bryden & Lengnick, *supra* note 4, at 1257.

⁸⁴ 3 WHARTON'S CRIMINAL LAW § 47 (15th ed. 1994).

A third context is when a member of the public—say, a newspaper columnist—warns potential victims that certain conduct (such as binge drinking at college parties) can be dangerous. Some feminists believe that such remarks divert attention away from rapists’ guilt of a heinous crime and toward their victims’ behavior, which harms no one but themselves. We acknowledge this danger, but it is also dangerous to suppress such warnings, especially to immature youths who have acquired adult freedoms without enough adult experience and judgment. We think that the potential benefits of a warning outweigh the potential harms whenever the problem is common and the advice is both sound and devoid of any perpetrator-absolving innuendo. Ideally, warnings about binge drinking should be given by and to both sexes, but we would not denounce someone who issues a practical warning to young women without including a prefatory denunciation of rapists.

The issue should not be judged in isolation; it arises in many other contexts. Daniel Patrick Moynihan’s famous essay on the decline of the black family, which some unjustly criticized as victim-blaming, is a famous example.⁸⁵ During World War II, and for decades after formal censorship ended, historians rarely discussed atrocities committed by Allied soldiers; such stories might have led some readers to conclude, falsely, that “our boys” were just as barbaric as our enemies. Should the media voluntarily adopt the same policy today? Should journalists withhold stories about corporate misbehavior on the ground that they may encourage excessive hostility toward capitalism? Should they refrain from exposing false rape reports on the ground that such revelations may make people too suspicious of truthful ones? In a free society, such questions answer themselves.

By the same token, teachers and scholars who purport to offer summaries of the causes of rape should include, among other things, the double effect of women’s liberation, the harmful side effects of the sexual revolution, and statistical information about victims’ as well as perpetrators’ characteristics. This is the greatest difference between the TFA and the RAA. The routine activity framework for analysis does not require rejection of all feminist claims about cultural causes of men’s propensity to rape, but it legitimizes scholars’ discussions of the causal roles of the sexual revolution and women’s liberation—not in order to reverse either of these mostly beneficial historical developments but in order to describe more fully the causes of the crime.

Despite feminist fears of victim-blaming, a number of social scientists have conducted research on the traits and behaviors that are statistically associated with rape victimization. Many rape victims are virgins, but as a group the victims “have earlier and more experience with consensual sex with a greater number of partners (especially casual partners) than do women who do not report having been” victims. Victims also “have been reported to be less assertive, to score higher in

⁸⁵ See generally GREG WEINER, AMERICAN BURKE: THE UNCOMMON LIBERALISM OF DANIEL PATRICK MOYNIHAN 33–34, 67–69 (2015).

sensation seeking, to use more alcohol, . . . to exhibit lower self-esteem, to have experienced prior sexual victimization, to have been raised in single-parent homes, and to hold more liberal sexual attitudes.”⁸⁶ Longitudinal studies suggest that several of these characteristics antedate the rape experience rather than having been caused by it.⁸⁷ Of course, such studies do not purport to describe all or even necessarily most rape victims, any more than studies of athletes and fraternity men’s rape proclivities purport to describe all or most men in those groups.

Although we believe that the double effect of women’s liberation is obvious, we do not claim that it has been reliably measured by social scientists. Only a few scholars have conducted cross-jurisdictional studies of the effects of gender inequality on the incidence of rape. Their methodologies have been questionable, and the results have been mixed.⁸⁸ In a comprehensive study, covering official records of rapes in 89 different countries, Roy Austin and Young Kim found that gender equality was *positively* associated with the incidence of reported rapes.⁸⁹ However, as we suggested earlier, it seems likely that at some stage women’s liberation increases women’s willingness to report rape and, we will add, probably also increases the willingness of police to record certain reports—for instance, by prostitutes and mentally ill or drunken victims.⁹⁰ If so, this may have caused the positive association between measures of gender equality and official counts of the number of rapes.⁹¹

We cannot re-run history with different variables in the manner of experiments in the physical sciences, and we can argue forever about whether a particular cultural feature should be labeled “patriarchal,” a term whose inherent ambiguity is inflated by its pejorative innuendo. Given those realities, it is impossible to determine rigorously whether, in our society, patriarchy’s decline has (or has not) helped to prevent more rapes than it has helped to cause. Nor is it necessary to do so for any practical or even academic purpose. Gender equality is desirable for other reasons, even if its net effect is to increase the incidence of rape, which is far from certain. Suffice it to say that women’s progress has a double effect on the incidence of rape. This conclusion is supported more by common sense than by quantitative evidence.

⁸⁶ LALUMIÈRE ET AL., *supra* note 42, at 145.

⁸⁷ *Id.*

⁸⁸ For a methodological critique of several studies, see Roy L. Austin & Young S. Kim, *A Cross-National Examination of the Relationship Between Gender Equality and Official Rape Rates*, 44 INT’L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 204, 207–09 (2000).

⁸⁹ *Id.* at 212 (“Also noteworthy is the relatively strong relationship between homicide and rape....”).

⁹⁰ Police sometimes do not record rape reports when they believe that the accuser’s version of events is, or will be perceived by prosecutors or juries as, insufficiently credible to justify further investigation. Bryden & Lengnick, *supra* note 4, at 1306.

⁹¹ Cross-state comparisons may be somewhat superior in this respect, but they have methodological problems of their own. See Austin & Kim, *supra* note 88, at 207–209.

To illustrate (not to “prove”) that thesis, we will compare rape in modern American culture with the same crime among early seventeenth-century American Puritans. Their pre-modern culture was much more patriarchal than ours and consequently provides some relevant contrasts. Yet there is enough similarity between their problems and ours to warrant a comparative analysis. Their kinship to some of our patriarchal religious subcultures is evident. In addition, they had our language, Judeo-Christian religious origins, and English legal heritage. Beyond that, they are an excellent example of a culture that in some respects was well-designed for reducing the rape rate but at a cost that very few modern Americans would accept. As we proceed, we invite the reader, with occasional reminders from us, to compare the explanatory power of the TFA with that of the RAA.

III. WAS THE PURITAN CULTURE RAPE-SUPPORTIVE?

The Puritans were English Calvinists, hostile to the Church of England’s “papist” practices and fervently determined to eliminate the fornication and drunkenness that they perceived as rampant in England. In the early seventeenth century, many of them emigrated to New England, establishing Massachusetts Bay Colony, Plymouth, and the New Haven and Connecticut colonies. These were conceived as theocracies whose citizens pursued godliness rather than individual happiness. The Bible, they believed, was God’s guide for their daily lives. Puritan ministers and magistrates were responsible for inculcating its teachings.”⁹²

According to the popular stereotype, the Puritans were joyless fanatics who abhorred sex, imposed draconian penalties for infractions of their fundamentalist religious codes, and tolerated no dissent. For many years, historians have criticized certain aspects of such stereotypes, finding elements of moderation and conflict that the stereotypes ignore and sometimes disagreeing with each other about how to interpret the often fragmentary historical evidence. But no historian denies that the Puritan culture was much more patriarchal than ours. As Lyle Koehler put it, “[i]n virtually all avenues of behavior Puritans affirmed the differences and deemphasized the similarities between the sexes—a practice which usually worked to the disadvantage of women.”⁹³ Women were trained to be dependent; they rarely had occupations outside the home.⁹⁴ Puritan ideology held that women’s minds were as weak as their bodies: “In 1645, Emanuel Downing claimed that his wife made herself sick by ‘trying new Conclusions;’ he suggested

⁹² See generally JULIET HAINES MOFFORD, “THE DEVIL MADE ME DO IT!” CRIME AND PUNISHMENT IN EARLY NEW ENGLAND (2012).

⁹³ LYLE KOEHLER, A SEARCH FOR POWER: THE “WEAKER SEX” IN SEVENTEENTH CENTURY NEW ENGLAND 28 (1980).

⁹⁴ See generally *id.* at 108–135.

riding as a cure.”⁹⁵ Of course the community leaders were all male. Schools were sex-segregated and—apart from reading and writing—girls learned mostly domestic skills and religion.⁹⁶ Spinsters and widows could own property but could not vote for public officials.⁹⁷ A Puritan husband was the head of his family, the basic building block of Puritan society.⁹⁸ His wife could express her opinions but had to obey his decisions.

On the basis of the TFA, one would expect the Puritans to discriminate against women in the sexual realm just as they did in the political and economic realms, and in so doing to create a rape-supportive culture. There were indeed some sexual laws and attitudes that discriminated against women. Husbands were legally entitled to marital sex even when their wives did not consent.⁹⁹ Women’s, but not men’s, marital prospects were reduced by a fornication conviction.¹⁰⁰ Men were not treated as adulterers except when they had sex with another man’s wife or fiancée.¹⁰¹ In many respects, however, the Puritan culture seems to have been less rape-supportive than our own more egalitarian culture.

A. *The Case Records*

Several studies have found that prosecutions for rape were extremely rare in New England during the seventeenth and even eighteenth centuries. One of these was conducted by Koehler.¹⁰² Over the entire seventeenth century, throughout New England, he found clear evidence of only 72 men who had appeared before

⁹⁵ *Id.* at 30.

⁹⁶ *Id.*

⁹⁷ *Id.* at 44.

⁹⁸ MARY BETH NORTON, *FOUNDING MOTHERS & FATHERS: GENDERED POWER AND THE FORMING OF AMERICAN SOCIETY* 38 (1996).

⁹⁹ For a discussion, see *infra* text accompanying notes 123–27.

¹⁰⁰ See THOMPSON, *infra* note 117. This study found that eleven of twelve women convicted of fornication were afterwards able to find husbands, but these were generally of a lower status than the women’s. There is also evidence that, beginning in the late seventeenth century, the authorities adopted a double-standard in fornication cases, prosecuting women much more often than men. This appears to have been due to various factors, including the waning of the original Puritan settlers’ values due to immigration and generational changes, the greater ease of proving a pregnant woman’s guilt than that of her alleged lover, and a new policy of prosecuting fornicators only when the woman became pregnant. See generally RICHARD GODBEER, *SEXUAL REVOLUTION IN EARLY AMERICA* 229, 259 (2002); CAROL F. KARLSEN, *THE DEVIL IN THE SHAPE OF A WOMAN: WITCHCRAFT IN COLONIAL NEW ENGLAND* 198–202 (1989). Cf. Cornelia Hughes Dayton, *Taking the Trade: Abortion and Gender Relations in an Eighteenth-Century New England Village*, 48 WM. & MARY Q. 19, 21–22 (1991) (early Puritan communities treated male fornicators more severely than their eighteenth-century counterparts did).

¹⁰¹ Thorpe L. Wolford, *The Laws and Liberties of 1648*, in *ESSAYS IN THE HISTORY OF EARLY AMERICAN LAW* 147, 183 (David H. Flaherty ed., 1969).

¹⁰² KOEHLER, *supra* note 93.

the Puritan authorities on a charge of taking forcible sexual liberties with 78 non-consenting females.¹⁰³ The victims included 26 unwed servants, only nine other single women, 35 wives (of other men), and eight children between the ages of three and 13.¹⁰⁴ In only 28 of these cases did the woman testify that there had been a completed rape.¹⁰⁵ Three-fourths of the rapists and attempted rapists made no effort to verbally persuade their victims to consent to sexual relations, relying instead on sheer force.¹⁰⁶ In over 85 percent of the cases, the victim was a neighbor or a servant in the same household.¹⁰⁷ One-third of the rapes occurred in the forest or other isolated terrain: “[t]he woman’s usual familiarity with the man undoubtedly contributed to her willingness to trust him” enough to accompany him to the site of the rape.¹⁰⁸ Women seldom went far from their homes, however, and to gain entrance a rapist had to find a time when the adult males were absent, under the pretext of borrowing something or collecting bills: “[h]usbands, sons, brothers, and other women were usually in close enough proximity to make rape impossible.”¹⁰⁹

Although some victims fought back, most responded only “with shocked disbelief and some verbal objection; only seven actually scratched or bit their assailants.”¹¹⁰ Koehler supposed that rapists who knew their victims may have chosen “demure, non-assertive” ones; he added that Puritan women had been “trained to occupy a passive and dependent position” and so “could not be expected to suddenly transform . . . [themselves] into a fighting, undeferential spirit.”¹¹¹ This feeling of inferiority, he observes, must have been even greater when the victim was a servant and the rapist was her master or one of his relatives.¹¹²

In these recorded cases, the largest class of defendants was white servants (34.3%).¹¹³ Black servants or slaves accounted for 8.6%; Indians 11.4%; yeoman farmers 24.3%; and single members of farm households 11.4%.¹¹⁴ In only four cases was the defendant designated as “Mr.,” which was “the usual title for a

¹⁰³ *Id.* at 92.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 98.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 97–98.

¹¹⁰ *Id.* at 98.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.* at 106 n.85.

¹¹⁴ *Id.*

gentleman.”¹¹⁵ Of course, the proportions of actual as opposed to formally accused rapists may have differed considerably from these figures. The safest inference, perhaps, is that many rapists and victims were servants. Hardly any rapes of non-servant single women were reported; this is consistent with the hypothesis that parental guardianship was highly effective in preventing rape.¹¹⁶ Male servants had the advantages of being away from their parents’ supervision and legitimate proximity to, and familiarity with, young female servants whose parents lived elsewhere—factors that a routine activity scholar would surely stress. On the other hand, daughters within the nuclear family were no doubt sometimes victimized by male relatives, a type of crime that presumably was grossly under-reported.

Subsequent studies have confirmed that only a tiny fraction of New England women reported that they had been sexually assaulted. For example, Roger Thompson studied the county court records of Middlesex County, Massachusetts between 1649 and 1699.¹¹⁷ Over this fifty-year period, he found only 27 cases of alleged rape, attempted rape, or sexual abuse among a population whose estimated size rose from 2,990 in 1647 (two years before the study period) to roughly 12,017 in 1699.¹¹⁸ The paucity of rape cases continued throughout the following century. Barbara Lindemann examined the statewide records of Massachusetts rape cases between 1698 and 1797, finding only 43 indictments for rape or attempted rape (forty separate cases with thirty-six defendants).¹¹⁹ During the decades of that century the number of rape cases per 100,000 population ranged from zero to 3.5; more often than not, it was under two—extremely low by modern American standards.¹²⁰

Such studies are not adequate evidence of patriarchy’s effect on the rape rate in early New England. Even assuming (as we are inclined to do) that their rape rates were much lower than ours, several explanations other than patriarchy are plausible, notably their more tightly-knit rural villages, lack of mobility, suspicion of strangers, and the enduring harm that would be caused in a small rural community by a criminal or lecherous reputation.

Equally important, the Puritans’ actual rape rate, even if lower than ours, may have been much higher than the number of recorded cases. The Puritans lacked the anonymous “victim surveys” that—when compared with police records of

¹¹⁵ *Id.*

¹¹⁶ Another possibility, however, is that the victims and their parents generally feared the publicity that a public trial would entail, especially in cases in which the daughters’ conduct prior to the rape had violated Puritan standards or the rapist was a relative.

¹¹⁷ ROGER THOMPSON, *SEX IN MIDDLESEX: POPULAR MORES IN A MASSACHUSETTS COUNTY* (1986).

¹¹⁸ *Id.* at 11–12.

¹¹⁹ Barbara S. Lindemann, “*To Ravish and Carnally Know*”: *Rape in Eighteenth Century Massachusetts*, 10 *SIGNS* 63, 63–64 (1984).

¹²⁰ *Id.* at 70.

reported crimes—enable modern criminologists to estimate what proportions of crime victims failed to file an official report.¹²¹ Given the Puritan belief that a woman who lost her virginity (even innocently) was ruined, Puritan victims (and their parents?) probably were even less willing to report the crime and endure a public trial than modern victims.¹²² Even if that was not true in stranger cases, it may well have been true when the parties were acquainted and a consent defense was plausible.

No doubt many Puritan servants were extremely reluctant to accuse their master or one of his male relatives. Private settlements, avoiding the publicity that nobody wanted, were almost certainly the best outcome that most servant victims could even hope for in such cases. Even when the rapist was just another servant, as was probably typical, his victim may have been afraid to risk her employer's displeasure by making an accusation that might raise questions about the propriety of her own conduct prior to the alleged rape, as judged by the exceedingly strict standards of the time. Not only might she lose her job, her reputation might be ruined if the rapist offered a consent defense; indeed, they might both be convicted of fornication. This is another reason for supposing that the number of actual rapes in Puritan times may have been vastly greater than the number of rape cases, even more so than in our own society.

B. Men's Propensity to Rape

With no pretense of rigorous statistical proof, let us try to determine which culture, the Puritans' or ours, seems to have been more rape-supportive. We will subdivide this inquiry in accordance with the RAA's three causal categories: men's propensity to rape, their access to what they regard as suitable targets, and the targets' lack of "guardianship" (that is, their vulnerability).

For married couples, the Puritans followed the traditional rule: A husband was entitled to have sex with his wife whenever he wished to do so.¹²³ About half of our states have abolished this "marital exemption;" the rest have modified it in various ways.¹²⁴

This is not to say that the Puritans encouraged husbands to ignore their wives' feelings. They usually wanted many children.¹²⁵ They believed that conception could not occur without a female orgasm; husband and wife should both

¹²¹ See generally FELSON & BOBA *supra* note 74, at 20–21. These victim surveys are imperfect but generally considered to be superior to estimates based on reported crimes. See generally Bryden & Lengnick, *supra* note 4, at 1218–20.

¹²² See THOMPSON, *supra* note 117, at 64, 1649–1699 (1986).

¹²³ KOEHLER, *supra* note 93, at 101.

¹²⁴ MODEL PENAL CODE, *supra* note 7, at 157–58.

¹²⁵ KARLSEN, *supra* note 100, at 73.

experience “delight” during intercourse.¹²⁶ In many Puritan marriages, and in modern America, reciprocal empathy and kindness may have been more influential than legal rights. But even if we assume *arguendo* that Puritan husbands rarely resorted to forcible sex, it is more certainly true that the absence of force by the husband was commonly due to the absence of resistance by the wife and that this in turn was often due to the general belief, embodied in the law, that disagreements about whether to engage in marital sex must be resolved in favor of the husband. Therefore, we do not question the conventional view that their marital culture was more sexually coercive than ours.¹²⁷ The husband’s right in a patriarchy to sex on demand is Exhibit A in any brief for the TFA. But it can also serve as Exhibit A in a brief for the RAA because it illustrates the value to potential rapists of obtaining unrestricted access to unguarded (and often disrobed) women.

Despite the paucity of recorded rape cases, Koehler maintained that the Puritan culture was rape-supportive even with respect to single men and women. His arguments interest us because he is an excellent example of a scholar who used the TFA as a basis for speculation about rape in the Puritan colonies. Drawing on feminists’ theories about rapists’ non-sexual motives, Koehler describes “cultural tendencies” that “collectively might [have] predispose[d]” Puritan men to commit rape.¹²⁸ Those men had a “very real feeling of powerlessness before God, nature and the authorities.”¹²⁹ That, he added, led Puritan men to “polarize sex roles into rigid terms of male dominance and female submission” and may have caused some to want to “test and affirm their masculinity through forcible intercourse.”¹³⁰ Such men may have raped because they sought “power” and “control” as proof of masculinity.¹³¹

This sort of motivational speculation is much too facile. The problem is that more or less plausible motivational theories, purporting to explain all sorts of behaviors, from larceny to conducting an orchestra, are easy to imagine but typically too abstract, difficult to test, and dogmatic.¹³² Koehler’s theories exemplify this problem. Who doesn’t seek “power” and “control” over people in general and the opposite sex in particular? Which men do not wish to “confirm

¹²⁶ GODBEER, *supra* note 100, at 59 (2002).

¹²⁷ For a discussion of possible historical reasons for the husband’s right to sex with his wife, and for its abolition in modern societies, see POSNER, *supra* note 14, at 388–91 (1992).

¹²⁸ KOEHLER, *supra* note 93, at 92.

¹²⁹ *Id.*

¹³⁰ *Id.* at 92–93.

¹³¹ *Id.*

¹³² The word “motive” is definitionally elusive, yet rarely defined even by those who regard motives as extremely important causes. See generally Bryden & Grier, *supra* note 9, at 171, 197, 227–230 (proving masculinity), 230–246 (power, control, and domination). The epistemological problems are similar to those raised by dogmatic Freudian motivational claims. Compare *id.* at 176–179, with *id.* at 187.

their masculinity” in one way or another? Does Koehler mean to imply that there were fewer rapes in times when, and places where, American males felt more powerful “before God, Nature, and the authorities”? When and where was that?¹³³

One could just as plausibly surmise that deskbound modern men have a greater need to prove their masculinity than did the more muscular Puritan farmers and artisans. If all men want to prove their masculinity then the concept is useless as an explanation of why some rape but most do not. We do not mean to suggest that rapists never have this ulterior motive among others; multiple motives often exist for all sorts of behavior, including those whose origins are obviously biological—eating, for example.

Continuing his argument, Koehler mentions “the currency of the belief [among Puritans] that women existed to serve men’s needs.”¹³⁴ That was true in some contexts but not in the most relevant ones. The Puritans treated all non-marital sex as sinful and criminal. Forcible rape was one of the most serious crimes.¹³⁵ Fornication was both a sin and a crime. Wives were taught to serve their husbands’ sexual and other needs,¹³⁶ but serving other men’s sexual needs was the capital crime of adultery.¹³⁷

¹³³ Some believe that American males have been anxious about their masculinity for centuries, with many harmful effects. See STEPHEN J. DUCAT, *THE WIMP FACTOR: GENDER GAPS, HOLY WARS, AND THE POLITICS OF ANXIOUS MASCULINITY* (2004). For all we know, that anxiety may be greater today than it was among the Puritans.

¹³⁴ KOEHLER *supra* note 93, at 92.

¹³⁵ *Id.*, at 94–95. The usual punishment for rape was death or a severe lashing, sometimes accompanied by a fine. *Id.* at 95–96. For all capital crimes, two witnesses were required. GODBEER, *supra* note 100, at 48, and it is safe to assume that some rapes were charged as attempted rape or fornication (for which a less severe lashing was common), either because of lack of the requisite witnesses (cf. KOEHLER, *supra* note 93, at 96) or officials’ desire to exclude the death penalty. Puritan records are sometimes unclear about the precise nature of the sexual crime of which the defendant was convicted. E.g., KOEHLER, *supra* note 93, at 97. “For fornication with any single woman, the Massachusetts Bay Colony Law provided in 1642 that the punishment would be ‘either by enjoining to marriage, or fine, or corporal punishment or all or any of these as the Judges in the Courts of Assistance shall appoint most agreeable to the Word of God.’” MOFFORD, *supra* note 92, at 74. The usual penalty was a substantial fine or a public lashing. GODBEER, *supra* note 100, at 101. Fornication was the most common crime on the dockets in colonial New England other than “disguised in drink.” MOFFORD, *supra* note 92, at 74. Offenders could be single men, single women, or even recently married couples if the previous fornication could be proved, usually by the early arrival of a baby: “Bridal pregnancy was surprisingly common. . . . [One scholar] estimates that one-third of early-eighteenth-century New England brides were pregnant when wed. Although the couple would most likely have ended up as man and wife anyway, they were still usually fined and flogged. They could also expect to be chastised for ‘uncleanliness’ in front of the entire congregation at their local meetinghouse.” *Id.* at 77. This should be understood in context of a culture in which the mean age for marriage in New England between 1630 and 1675 “was twenty-six years for men and just over twenty years for women.” *Id.* at 75. Between 1676 and 1692 most men were 27 years old when they wed, while women were generally twenty-two or twenty-three. *Id.*

¹³⁶ KOEHLER, *supra* note 93, at 32–33.

¹³⁷ MOFFORD, *supra* note 92, at 82–86.

Koehler also mentions the Puritan notion that male sexual desire is “explosive.”¹³⁸ It is unclear, however, whether that ambiguous and misleading description was more popular among the Puritans than it has been in modern America,¹³⁹ and Koehler provides no evidence that the Puritans invoked it as a ground for acquitting rapists. To the Puritans, the power of sexual desire seems to have been a reason for restricting contacts between the sexes, not for leniency toward rapists.¹⁴⁰

Although Koehler’s motivational arguments were unpersuasive, many rape scholars have agreed with his premise that patriarchal cultures are inherently more rape-supportive than cultures in which the sexes are more nearly equal. Both common sense and a large body of social scientific research seem to support this hypothesis. Even if a man’s goal is sexual, one supposes that his willingness to achieve that goal by force is affected by his beliefs about women and rape; they may be disinhibitors even if they are not motives. Whatever his motive, a rapist subjugates a woman; it seems to follow that, all else being equal, men who want to subjugate women in other ways will be more likely than egalitarian men to favor forcible sexual subjugation.

To test this theory, central in the TFA, scholars have developed many measures of “patriarchal” or “masculine” ideology—for example, scales measuring a man’s Rape Myth Acceptance and Attitudes Toward Women. They have calculated the extent to which men’s scores on these measures correlate with their scores on measures of their anonymously divulged coercive sexual behaviors or willingness to rape if certain that “no one would ever find out and you’d never be punished for it.”¹⁴¹

These studies are only partially supportive of the TFA. In a meta-analysis of 39 studies employing eleven different measures of patriarchal or masculine ideologies, Sarah Murnen and her coauthors found that patriarchal attitudes increase the likelihood that a man will commit rape only when they are combined with certain other ideological variables: “[I]n order to be sexually aggressive toward women, one would need to be accepting of violence in relationships, believe that women deserve violence (hostility toward women), and think that it is

¹³⁸ KOEHLER, *supra* note 93, at 91–94.

¹³⁹ Brownmiller treated it as a common myth. See BROWNMILLER, *supra* note 2. See generally Bryden & Grier, *supra* note 9, at 213. The belief is harmless unless it encourages potential rapists or leads to leniency toward rapists, of which we have found no evidence among Puritan magistrates’ dispositions of rape cases or in the Puritan settlers’ ideology.

¹⁴⁰ According to Koehler’s study, Puritan magistrates convicted rapists even if their victims had not physically resisted the attack; they assumed that victims would be immobilized by fear. KOEHLER, *supra* note 93, at 96. This may have been because few rapes, or at least few reported ones, occurred in romantic settings where physical resistance is customary and usually safe.

¹⁴¹ Sarah K. Murnen et al., *If “Boys Will Be Boys,” Then Girls Will Be Victims? A Meta-Analytic Review of the Research That Relates Masculine Ideology to Sexual Aggression*, 46 SEX ROLES 359, 365 (2002).

men's place to be dominant (e.g., dominance/power ideology)."¹⁴² Of these, only the last is thoroughly consistent with the teachings of the Puritans' moral instructors. They supported male supremacy but not hostile attitudes toward women.¹⁴³

Feminist rape scholars rarely distinguish sharply between men's patriarchal and hostile attitudes because both are harmful to women, and of course they sometimes co-occur. But when focusing on the causes of rape, there seems to be a critical difference between men who regard women as subordinate but worthy of love and respect within their circumscribed traditional roles and those who regard them as both subordinate and adversaries. Both types exist, but the degrees of cultural encouragement they receive vary from one culture to another. Unmarried Puritan men had no right to use force against women, except in circumstances in which they could do the same to men—self-defense or punishing a servant, for example.¹⁴⁴ Thus, the patriarchal Puritan culture endorsed some but not all of the three elements that this meta-analysis concluded were essential components of a rape-prone individual ideology.

Some feminists assert that patriarchy is a cause of pornography, which in turn is a cause of rape.¹⁴⁵ That claim has inspired more legal and social scientific theories and empirical studies than we can possibly discuss here. To simplify matters we will confine our brief analysis to the relationship between patriarchy and pornography.

The Puritans did not have a significant pornography problem, but we do. Why is that? One obvious answer is the technological advances (photography, films, cable television and the Internet) that have vastly increased the realism, accessibility and profitability of sexual imagery. But this explanation, important though it is, appears to be incomplete. Richard Godbeer notes that the primitive printed matter circulated among Puritan readers lacked the salacious remarks about women that are common in our more egalitarian culture.¹⁴⁶ Even if some Puritan

¹⁴² *Id.* at 370.

¹⁴³ See, e.g., NORTON, *supra* note 98, at 75–76. See also KOEHLER, *supra* note 93, at 31–34, 36, 49. Cf. KARLSEN, *supra* note 100, at 179–81.

¹⁴⁴ See, e.g., MOFFORD *supra* note 92, at 195. In a couple of New England colonies, even husbands' right to employ "corrective" violence against their wives was restricted to self-defense. To be sure, in most of the New England colonies husbands could punish disobedient wives (and of course children). However, "excessive" beatings were regarded as evidence of the husband's inability to govern and, when reported by a neighbor or an esteemed citizen, sometimes led to official intervention. In its first comprehensive legal code, the Massachusetts Bay Colony forbade husbands to strike their wives except in self-defense; this was later repealed then (nine years later) restored. In 1671 Plymouth Colony adopted a similar provision, but no other colony did so. NORTON, *supra* note 98, at 29, 74, 78.

¹⁴⁵ E.g., ANDREA DWORKIN, PORNOGRAPHY: MEN POSSESSING WOMEN 137–38 (1979); ALLAN G. JOHNSON, THE GENDER KNOT: UNRAVELING OUR PATRIARCHAL LEGACY 77 (1997).

¹⁴⁶ GODBEER, *supra* note 100, at 272–73. He adds that this changed in the eighteenth century, as Puritan values waned. *Id.*

genius had invented photography and films, it is inconceivable that Puritan leaders would have tolerated the massive dissemination of pornography and sexually stimulating scenes that are pervasive in our culture.

Another obvious, albeit also incomplete, cause of men's attraction to depictions of impersonal sex is their attraction to actual impersonal sex.¹⁴⁷ The fantasies created by pornography may not be harmless, but they are fantasies. Janet Hyde's 2005 meta-analysis of the social-scientific literature about differences between the sexes found that, while most of the alleged differences are small or nonexistent, the male-female difference in attitudes toward uncommitted sex remains "strikingly large."¹⁴⁸ So it is not surprising that on average men derive greater pleasure than women do from explicit depictions of casual sex. There is no credible evidence that the pleasure derived from pornography diminishes, for most men, if the depictions are of mutually enjoyable consensual sex, with no depictions of practices that most women regard as egalitarian.¹⁴⁹ While it is true that many consumers of pornography have relatively successful sex lives, that does not rebut the old-fashioned assumption that pornography is a substitute for the real sex, or the sexual variety, or the extraordinarily young, pretty and uninhibited mates who are at least temporarily unavailable to the consumer, however successful his sex life has been relative to other men's. In this sense, pornography is a substitute for, not an expression of, male sexual power.

Male sexuality is a necessary though insufficient cause of the proliferation of pornography. Patriarchy in religious American cultures, has been an imperfect but largely successful cause of its suppression. Until feminists began their anti-pornography campaign, patriarchal religious subcultures were the main opponents of the sexual revolution and of the pornography that it helped to legitimize. Their opposition included, though it was not limited to, violent and other egalitarian scenes. Brownmiller acknowledged this but added that the ideology of these traditional anti-pornography groups was repugnant: they were too right wing, southern, prudish, and anti-feminist.¹⁵⁰ In other words, they were repulsive adversaries whose prudish and religious reasons for censoring pornography were

¹⁴⁷ Even most men with above-average rape proclivity seem to prefer pornography in which the women are portrayed as consenting, either initially or during the sexual act, rather than as continually abhorring the experience. See studies cited by Bryden & Grier, *supra* note 9, at 224–25.

¹⁴⁸ Janet Shibley Hyde, *The Gender Similarities Hypothesis*, 60 AM. PSYCHOLOGIST 581, 586 (2005).

¹⁴⁹ A recent study found that on average pornography users held more egalitarian attitudes—toward women in positions of power or who work outside the home—than nonusers. Taylor Kohut, Jodie L. Baer & Brendan Watts, *Is Pornography Really About "Making Hate to Women"? Pornography Users Hold More Gender Egalitarian Attitudes than Nonusers in a Representative American Sample*, 53 J. SEX RES. 1 (2015). An earlier Danish study reached a contrary conclusion. *Id.* at 8. A plausible explanation is that the American sample probably contained more men (e.g., Southern Baptists) who opposed both pornography and gender equality. *Id.*

¹⁵⁰ BROWNMILLER, *supra* note 2, at 392–95.

incorrect. Brownmiller called for censorship of pornography in the name of gender equality, thus refuting some liberal men's charge that pro-censorship feminists were prudes, and shaming those sexually liberated males who claimed to favor gender equality but defended pornography as harmless, constitutionally protected speech.¹⁵¹

Some genres of pornography do indeed contain violent or blatantly misogynistic scenes. But why attribute these to patriarchy? Pornography of all genres has proliferated, not during our most patriarchal eras, but as patriarchy has declined since the 1960s. Some may assert that misogynistic and violent pornography are due to a male backlash against women's progress, but over the same period most men have become more, not less, inclined to support gender equality.¹⁵²

Certainly the sexual revolution has been a major cause of our modern, pornography-tolerant culture. Despite some conservative scholars' efforts to justify censorship without reverting to Victorian prudery,¹⁵³ there is no social consensus about how to reconcile approval of non-marital casual sex with disapproval of egalitarian depictions of it. This dilemma disappears if one accepts a religious dogma that condemns both non-marital sex and pornography, but most Americans no longer believe such "puritanical" dogmas. Nor do they accept the radical feminist dogma that in our allegedly patriarchal culture heterosexual intercourse (and therefore depictions of it) is inherently coercive and demeaning to women.¹⁵⁴

Offhand, one might suppose that seventeenth-century New England was full of "sex-starved" young males who often resorted to rape. As we have indicated, this possibility is not conclusively disproved by the fact that hardly any rapes were reported to the authorities. But social scientists have found that long-term sexual deprivation is not associated with rape proclivity among modern American civilians. On the contrary, contemporary rapists tend to have been more sexually precocious, and to have had more frequent and varied consensual sexual experiences than other men.¹⁵⁵ One may speculate, as well, that our hedonistic, sex-saturated culture does more to intensify young men's sexual desires than the mere fact of being a virgin, surrounded by mostly virgin peers,¹⁵⁶ in a culture in

¹⁵¹ *Id.* at 394–95.

¹⁵² See *supra* text accompanying notes 31–32.

¹⁵³ For examples, see David P. Bryden, *Between Two Constitutions: Feminism and Pornography*, 2 CONST. COMMENT. 147 (1985).

¹⁵⁴ See, e.g., ANDREA DWORKIN, *INTERCOURSE* (1987). Cf. Bryden, *supra* note 154.

¹⁵⁵ Bryden & Grier, *supra* note 9, at 200. Perhaps rapists and unusually successful seducers tend to have certain traits in common—maybe boldness, lack of empathy, a predator's eye for vulnerability, or an extraordinary (even by male standards) obsession with sexual gratification.

¹⁵⁶ Several social scientists have found that pressure from peers to engage in sexual relationships is associated with rape. E.g., Antonia Abbey et al., *Cross-Sectional Predictors of Sexual Assault Perpetration in a Community Sample of Single African American and Caucasian Men*,

which teenagers had little spare time, little mobility, much more parental supervision,¹⁵⁷ strict rules against activities with sexual overtones, and an ethic of delayed gratification.¹⁵⁸

Does religion tend to reduce a man's rape proclivity? Not all those who lived in seventeenth-century New England were religious, and of course many modern Americans are deeply so. But on the whole the Puritan culture was much more uniformly and intensely religious than ours. Studies of whether religious beliefs and practices reduce crime have yielded mixed results, reflecting the complexity of the subject and the difficulty of developing sound measures of religiosity.¹⁵⁹ Hirschi and Stark found that "participation in religious activities and belief in a supernatural sanctioning system have no effect on delinquent activity."¹⁶⁰ This counter-intuitive finding provoked a split among criminologists. Some reached similar conclusions. For example, Lee Ellis argued that the law-abiding tendency of churchgoers is not due to the teachings of religion.¹⁶¹ He suggested that delinquent adolescents are neurologically predisposed to criminality: Their under-aroused nervous systems create a desire for intense stimulation, a craving that sometimes leads to crime.¹⁶² Such youths are less willing to attend religious services, which they find boring.¹⁶³ Thus, the statistical relationship between rejection of religion and criminality is "coincidental (spurious), not causal."¹⁶⁴

32 AGGRESSIVE BEHAV. 54, 61 (2006). If this correlation is causal, it seems to follow that in an environment in which most of one's peers are virgins who regard fornication as sinful there would be less rape, all else being equal.

¹⁵⁷ Although some feminists have emphasized the dangers and patriarchal oppressiveness of family life, a recent study found that college women who had often asked their parents for advice were less often victims of serious sexual assaults than those who had sought advice from others or figured things out for themselves. Mustaine & Tewksbury, *supra* note 7, at 117. This is probably what most people would expect.

¹⁵⁸ Farmers' sons, for example, were often unable to accumulate wealth before their fathers died. See generally KARLSEN, *supra* note 100, at 207–08, 218.

¹⁵⁹ See Byron R. Johnson et al., *A Systematic Review of the Religiosity and Delinquency Literature: A Research Note*, 16 J. CONTEMP. CRIM. JUST. 32 (2000) (finds that religion does reduce rates of delinquency, but calls for substantial additional research); Thomas J. Bouchard Jr. et al., *Intrinsic and Extrinsic Religiousness: Genetic and Environmental Influences and Personality Correlates*, 2 TWIN RES. 88–89 (1999); T. David Evans et al., *Religion and Crime Reexamined: The Impact of Religion, Secular Controls, and Social Ecology on Adult Criminality*, 33 CRIMINOLOGY 195 (1995) (finds that participation in religious activities is associated with decreased participation in crime, but notes the complexity of designing adequate studies and the importance of controlling for secular factors like poverty). For an excellent discussion of some of the methodological problems, see James Q. Wilson, *In the Pew Instead of Prison*, WALL ST. J., May 9, 2011, at A15.

¹⁶⁰ Travis Hirschi & Rodney Stark, *Hellfire and Delinquency*, 17 SOC. PROBS. 202, 211 (1969).

¹⁶¹ Lee Ellis, *Religiosity and Criminality from the Perspective of Arousal Theory*, 24 J. RES. CRIME & DELINQ. 215 (1987).

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.*

Ellis's argument can be broadened to include the possibility that people who are predisposed to behave altruistically (or in accordance with societal norms) are, all else being equal, more likely to participate in religious activities because they enjoy the communal feelings and emotional support provided by fellowship with others who share their values. On this theory, the desire to behave properly is one of the causes of religious affiliation rather than vice-versa.

Of course, the causal arrow may point in both directions. Be that as it may, most researchers have found that religion does reduce crime. Baier and Wright conducted a meta-analysis of sixty studies; they found "solid evidence" that "religious belief and behaviors exert a moderate deterrent effect on individuals' criminal behavior."¹⁶⁵ However, there was more support for this conclusion in studies of nonviolent crime than in those of violent crime.¹⁶⁶ The issue is still open: In a nationwide study of college students, researchers found that "[t]he rate at which women [anonymously] reported having been raped was twice as high in private colleges (14%) and major universities (17%) as it was at religiously affiliated institutions (7%)."¹⁶⁷ The correct explanation of this finding is uncertain,¹⁶⁸

As we have noted, the consensus of modern scholars holds that prior to the feminist anti-rape campaign the American criminal justice system was too lenient toward acquaintance rapists.¹⁶⁹ As we also observed, women's liberation and the anti-rape campaign seem to have reduced this problem.¹⁷⁰ It seems to follow that in twentieth-century America patriarchy was a leading cause of excessive leniency by the criminal justice system toward acquaintance rapists.¹⁷¹ There is no strong

¹⁶⁵ Colin J. Baier & Bradley R. E. Wright, "If You Love Me, Keep My Commandments": A Meta-Analysis of the Effect of Religion on Crime, 38 J. RES. CRIME & DELINQ. 3, 3 (2001).

¹⁶⁶ *Id.* at 16.

¹⁶⁷ Mary P. Koss, Christine Gidycz & Nadine Wisniewski, *The Scope of Rape: Incidence and Prevalence of Sexual Aggression and Victimization in a National Sample of Higher-Education Students*, 55 J. CONSULTING & CLINICAL PSYCHOL. 162, 166 (1987).

¹⁶⁸ One possible explanation is that religious institutions supervise students more closely, are on average smaller, and are more likely to expel those who misbehave. FELSON & ECKERT, *supra* note 23, at 20. Other possible causes are the lower rate of consensual sex or drinking in the student body, greater ethical inhibitions among the students, or greater shame among victims (particularly those who had violated one of the sect's sexual norms), leading to a decreased willingness to report the crime. For a valuable study and review of research on the relative effects of religious schools per se, their restrictions on drinking, and their regulations that confine the opportunities for consensual sex during college, see Bradford Richardson & Jon A. Shields, *The Real Campus Sexual Assault Problem—And How to Fix it*, COMMENT MAG., Oct. 2015 at 26–31. Richardson's and Shields proposals may be effective in small sectarian colleges, but elsewhere their political feasibility is doubtful.

¹⁶⁹ See, e.g., *supra* text accompanying note 11.

¹⁷⁰ See *supra* text accompanying notes 11–29.

¹⁷¹ This proposition needs to be qualified in a number of ways. See generally Bryden & Lengnick, *supra* note 4.

evidence, however, that leniency toward unmarried rapists was characteristic of the seventeenth-century Puritan version of patriarchy. In his study of seventeenth-century New England rape cases, Koehler found that Puritan officials generally believed women's rape accusations and did not engage in victim blaming.¹⁷² Even in the eight cases where the community suspected the woman of inviting an advance, the man who made it received "sharp punishment."¹⁷³

Modern debates about substantive rape law are largely devoted to the concept of consent. How should it be defined? The importance of this issue is due to the fact that rape is one of our most severely punishable crimes, while consensual sex with a mentally competent adult usually is neither a crime nor even a serious moral transgression. The natural consequence of this legal and moral cliff is to make the definition of rape extremely important—except to the extent that it is modified by the discretionary decisions of victims and official decision-makers (including juries) or by other legal rules such as the requisite *mens rea* and the burden of proof. Reformers have responded to this problem by trying to broaden the definition of rape (or its modern equivalents such as "sexual assault") and have wisely divided the crime into degrees with differing maximum sentences. Such reforms must, of course, be judged on their individual merits. But if our only goal were to reduce the incidence of sexual coercion by single men, our modern reforms, though in other respects admirable, would look weak compared to the Puritans' moral and legal system.

Religious Puritans believed that God knew their secret thoughts, was incensed by disobedience to his decrees, and regarded non-marital sex as a grievous sin. Puritans were taught to search their consciences for "unclean" thoughts, resolving to stamp them out at the earliest possible stage.¹⁷⁴ This private thought control must often have failed, but there is no reason to suppose that it was wholly ineffective. Nosy neighbors were another deterrent to sexual misbehavior. When an unmarried couple aroused suspicions of sexual impropriety, this often led to slanderous gossip.¹⁷⁵ That alone could inflict serious reputational damage, and the offended neighbors might report the apparent misconduct to their congregation, where the miscreants might be publicly chastised.¹⁷⁶ Or someone might initiate a legal proceeding. None of these sanctions required proof that the accused had

¹⁷² KOEHLER, *supra* note 93, at 96.

¹⁷³ *Id.* at 96–97. This proposition is not as conclusive as it seems. In some cases, the records did not clearly indicate whether the defendant had been convicted of fornication rather than rape; either could be punished by a severe whipping. It is also possible that women who had violated Puritan moral standards were even more reluctant to report the crime than modern American women, with the result that the reported cases (much more often than the actual rapes) involved women whose characters were unassailable.

¹⁷⁴ The Puritans engaged in "relentless self-surveillance for 'unclean' impulses—unchaste thoughts, words, actions." GODBEER, *supra* note 100, at 84–85.

¹⁷⁵ *Id.* at 27.

¹⁷⁶ MOFFORD, *supra* note 92, at 77.

engaged in fornication: Puritans could be prosecuted for various kinds of suggestive “dalliances” or improper “carriage” including courting without parental permission, dancing, kissing, and assorted activities with sexual overtones.¹⁷⁷ Contrast this with our culture, in which acquaintance rapists can proceed slowly, from flirtation to hugging to kissing and then several stages of petting, with the possibility at each stage of female refusal followed by male force. Under Puritan law, even if the woman consented, both parties might be prosecuted for fornication, a sin as well as a crime. Thus, an accused Puritan rapist could be morally and legally guilty (albeit of a lesser crime) irrespective of whether his partner had consented.

C. Access to Vulnerable Targets

For several reasons, it was difficult for unmarried Puritan men to obtain access to vulnerable women.¹⁷⁸ Some of the difficulties were not caused by patriarchy. In Puritan villages, strangers were more readily noticed, and rapists lacked the automobiles that facilitate modern criminals’ searches for potential victims and flight after the crime. In general, urbanization tends to facilitate many sorts of crime.¹⁷⁹

Historians have mentioned various ways in which single Puritan males could obtain unsupervised access to their female peers. Juliet Mofford notes that “[s]ingle young adults frequently lived outside their family homes for lengthy spells of unchaperoned time, serving apprenticeships to learn a trade, or working as household servants” or assisting a mother with a newborn child.¹⁸⁰ There were trysts in nearby woods and fields, furtive meetings of servants after the rest of the household had retired for the night, and encounters in outbuildings such as barns.¹⁸¹ Some scholars point to the numerous prosecutions for fornication as

¹⁷⁷ See, e.g., *id.* at 23. Getting drunk, associating with bad company and “night walking” without parental consent were among the activities conducive to sexual misbehavior that the Puritan authorities sought to curb in youths of both sexes. If the parents failed in their duty to prevent such behavior, the child might be sent to another home. *Id.* at 24.

¹⁷⁸ Although this was controversial and risky, many residents of the Puritan colonies believed that a mutual commitment to marry was the key step in a valid marriage. GODBEER, *supra* note 100, at 22, 33–34, 38–40. For the purpose of distinguishing between the behaviors of single and married men, we think that a couple in a committed relationship of that sort, especially if they are living together, should be regarded as married, because they presumably would have regarded the male as having the sexual rights of officially married men.

¹⁷⁹ See BARON & STRAUS *supra* note 43, at 36, 182–83, 194–95.

¹⁸⁰ MOFFORD, *supra* note 92, at 75. Mofford also mentions opportunities provided by regular harvest gatherings, corn-husking bees, and periodic militia drills. *Id.*

¹⁸¹ Godbeer’s conclusion seems correct: It was “by no means impossible” to have non-marital sex, but the circumstances “were always precarious.” GODBEER, *supra* note 100, at 29. Inside Puritan homes, for example, the lack of private space created opportunities for sex, but also

further evidence that the Puritans often flouted the culture's norms about premarital abstinence, but these prosecutions are also evidence that doing so was dangerous.¹⁸²

The scholars who stress the opportunities for illicit sex among the Puritans are attacking the old stereotype of a thoroughly sexless Puritan culture. None of them suggests that single Puritan men's access to vulnerable women was even remotely comparable to that of modern American men. So far as feasible, theirs was a sex-segregated culture; ours is generally the opposite. Modern American women have much more sexual freedom than Puritan women; one cost of that progress is that potential rapists can more easily gain access to vulnerable women. Except in some religious subcultures, women are now free to become intoxicated in a bar, at a party, or when alone with a man, to accept rides from strangers, to venture out at night without a male protector, to join the military, and to have several monogamous sexual relationships without ruining their reputations. That some Americans still disapprove of some of these freedoms, and that unusually promiscuous women are still judged more harshly than equally promiscuous men are undeniable. But these realities do not gainsay the fact that the large measure of sexual freedom that is supported by our mainstream culture enhances potential rapists' access to vulnerable women, *which is not to say that this freedom should be condemned or restricted by law*.

In America today, drinking is the royal road to both consensual sex and rape; it is associated with both men's propensity to rape and women's likelihood of being raped.¹⁸³ Researchers consistently find that about half of all sexual assaults are committed by a man who had been drinking alcohol.¹⁸⁴ Women who have

facilitated exposure. *Id.* at 89. At the same time, the clustered layout of New England communities created a constant risk that neighbors would discover illicit sex. *Id.*

¹⁸² "Examples of cases brought before the bench on grounds of fornication and illegitimacy provide proof that Puritans and Pilgrims participated wholeheartedly in earthly delights." MOFFORD, *supra* note 92, at vii. Mofford, like other authors who have expressed similar conclusions, directed her comments against the old stereotype of Puritan sexual asceticism and never equated the Puritan sexual practices with our own.

¹⁸³ See generally Antonia Abbey et al., *Sexual Assault and Alcohol Consumption: What Do We Know About Their Relationship and What Types of Research Are Still Needed*, 9 AGGRESSION & VIOLENT BEHAV. 271 (2004). One study found that the frequency of alcohol use assessed at one point in time was the best predictor of sexual victimization occurring during the following six months. Amy M. Combs-Lane & Daniel W. Smith, *Risk of Sexual Victimization in College Women: The Role of Behavioral Intentions and Risk-Taking Behaviors*, 17 J. INTERPERSONAL VIOLENCE 165, 176 (2002).

¹⁸⁴ Abbey et al., *supra* note 183, at 275. The causal sequence is sometimes described as uncertain: "Some men may consciously or unconsciously drink alcohol prior to committing sexual assault in order to justify their behavior." *Id.* at 276. "Alternatively, personality characteristics, such as narcissism, or life experience, such as witnessing parental violence in childhood, may lead some men to drink heavily and to commit sexual assault." *Id.* While these hypotheses are reasonable, the disinhibiting effect of alcohol is unquestionable and apparent in contexts in which alternative causal

been sexually abused in childhood tend to drink heavily, to have many sexual partners, and to be sexually assaulted as adults.¹⁸⁵ The causal relationships are somewhat uncertain, but it seems clear that “[d]rinking in potential sexual situations increases women’s risk of being sexually assaulted both because sexually assaultive men may view them as easy targets and because they may be less able to respond effectively.”¹⁸⁶

The Puritans did not oppose moderate drinking,¹⁸⁷ but public drunkenness was a crime, and drinking by single women in the company of men was considered improper.¹⁸⁸ Women were not allowed to frequent the taverns, though they (usually the owner’s wife or daughter) could serve the men.¹⁸⁹ This is not to say that it was impossible for a Puritan male to rape an intoxicated female; only that it is infinitely easier to do so today largely because of the sexual revolution and the decline of patriarchal restrictions on women’s freedom to engage in activities that increase the risk that they will be raped.

Puritan women did not enjoy the benefits, or suffer the perils, of coeducation. For many years, some feminists have expressed alarm about an alleged rape “epidemic” or “crisis” in our colleges.¹⁹⁰ Refuting this view, a recent Justice Department study concludes that, compared to women in the same age range outside of higher education, women enrolled in post-secondary educational institutions are *less* likely to be raped.¹⁹¹ On the other hand, an even more recent

chains are implausible. Mustaine & Tewksbury, *supra* note 7, at 118 (alcohol intake found *not* to be a risk factor for victimization) is an outlier.

¹⁸⁵ Abbey et al., *supra* note 183, at 284–85.

¹⁸⁶ *Id.* at 285. Longitudinal studies suggest that “there is a reciprocal relationship between alcohol consumption and sexual assault victimization.” *Id.* at 286. Alcohol reduces men’s ability to interpret women’s cues and women’s ability to assess risks. *Id.* at 288.

¹⁸⁷ “The ship that brought John Winthrop to the Massachusetts Bay Colony in 1630 had more than ten thousand gallons of wine in its hold and carried three times as much beer as water.” DANIEL OKRENT, *LAST CALL: THE RISE AND FALL OF PROHIBITION* 7 (2010).

¹⁸⁸ On the Puritans’ strict attitudes toward drunkenness, see generally MOFFORD, *supra* note 92, at 18, 41–46. One study of Puritan fornication cases found that the female participant had rarely been drinking. THOMPSON, *supra* note 117, at 37. That is probably also true of the reported rape cases and even the unreported rapes.

¹⁸⁹ MOFFORD, *supra* note 92, at 44.

¹⁹⁰ For criticisms of such allegations, see Heather MacDonald, *An Assault on Common Sense: The Phony Campus Rape Crisis*, WEEKLY STANDARD (Nov. 2, 2015), <http://www.weeklystandard.com/an-assault-on-common-sense/article/1051200>; Neil Gilbert, *The Phantom Epidemic of Sexual Assault*, 103 PUB. INT. 54 (1991).

¹⁹¹ BONNIE S. FISCHER ET AL., U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, *THE SEXUAL VICTIMIZATION OF COLLEGE STUDENTS* (2000). The figures, derived from the National Crime Victimization Survey (NCVS), included in the post-secondary student category those who were enrolled in colleges, universities, trade schools, and vocational schools. *Id.* at 3. The rate of rape and sexual assault was 1.2 times higher for non-students (7.6 per 1000) than for students (6.1 per 1000). For both college students and nonstudents, the offender was known to the victim in about 80% of rape and sexual assault victimizations, and the proportions of offenders who had a weapon (about

study sponsored by the Association of American Universities found alarmingly high rates of rape and attempted rape in a sample of American colleges.¹⁹² High rates existed even at elite schools whose culture is strongly academic.¹⁹³

We will leave to others the task of evaluating this study's methodology. Accepting its reported findings, we wonder why sexual assaults in our colleges are a serious problem, though apparently less so than among youths who do not attend college. We submit that the culture at colleges like Harvard is not predominately patriarchal; sexual freedom, gender equality, and heavy drinking are more plausible explanations of their failure to achieve a lower rape rate.

Still, there may be some college subcultures that are both patriarchal and rape-supportive. Feminists have singled out fraternity men and male athletes for special attention. Allegedly, some fraternities and sports create or reinforce various rape-supportive beliefs: that violence is a manly and legitimate way to solve problems; men are naturally aggressive and dominant over women; relations between the sexes are adversarial; the sexual "conquest" of women is an important proof of masculinity; women are primarily sex objects; star athletes feel "entitled" to sex; and the like.¹⁹⁴ According to "cultural spillover theory," when violence and aggression are encouraged in one area of life, this can carry over to other areas such as forcible sex.¹⁹⁵ This problem is said to be exacerbated by the prestige and

10%) did not differ significantly. *Id.* For both students and nonstudents, the rate of rape and sexual assault was lower than the rate of aggravated and simple assault, but higher than the rate of robbery. *Id.* at 5. For nonsexual types of violent crime, the rate of female victimization was lower for students than for nonstudents. For a discussion of methodological differences between the NCVS and some other victim surveys see *id.* at 2.

¹⁹² CANTOR, ET AL., ASSOC'N OF AM. UNIV., REPORT ON THE AAU CAMPUS CLIMATE SURVEY ON SEXUAL ASSAULT AND SEXUAL MISCONDUCT (2015).

¹⁹³ At Harvard, for example, researchers found that sixteen percent of female seniors in the College had suffered from completed or attempted nonconsensual penetration during their time at Harvard. Jonathan Shaw, *Harvard's Sexual Assault Problem*, HARV. MAG., Nov.-Dec. 2015, at 18, 18. Consumption of alcohol by the perpetrator, the victim or both played a role in most of these instances, over 75% of which occurred in a dormitory. *Id.* Only sixteen percent of Harvard female undergraduates believed it very or extremely likely that campus officials would take action toward an offender. *Id.* Among female college students who indicated that they had experienced an incident of penetration by force, 69% did not formally report it to anyone, nor did 80% of those women who experienced an incidence of penetration by incapacitation. *Id.* The most frequently cited reason for not reporting was a belief that it was not serious enough to report. *Id.* Is Harvard's rape problem due to a "rape supportive" campus culture? If so, is that culture due to patriarchy, sexual freedom, gender equality, or some combination of these and other factors? Do we need longitudinal studies that might reveal patriarchal influences in the childhoods of these students?

¹⁹⁴ Sarah K. Murnen & Marla H. Kohlman, *Athletic Participation, Fraternity Membership, and Sexual Aggression Among College Men: A Meta-Analytic Review*, 57 SEX ROLES 145, 146-47 (2007).

¹⁹⁵ *Id.*

privileges accorded to athletes and members of fraternities, which can lead to “feelings of entitlement.”¹⁹⁶

On many campuses, this theory sounds so logical that it is easy to overlook certain weaknesses of the supporting evidence. One problem is that the plausibility of the spillover theory varies from one team sport to another; by lumping several types of sports together, as many studies do, one gets a result that is almost as uninformative as the average temperature in a Minnesota year. True, even baseball players seek to dominate the opposition. But the analogy between dominating other males in a lawful, non-violent competition and raping women seems strained.

The spillover theory is most plausible when applied to a violent sport like football. But the violence in football is in the context of a consensual contest between men who respect each other and are sometimes friends off the field. That is not closely analogous to rape; it is more like rough but genuinely consensual sex. We are also troubled by spillover theorists’ failure to consider whether the spillover theory is ever true when its logic leads to conclusions that the theorist deplores. Does government aid to poor men give them a “sense of entitlement” that spills over into their relationships with women? Are there some *beneficial* spillovers from participation in team sports? In football, for example, players must control their urges to punch opposing players, miss practices, disobey their coaches, and play selfishly. Does the self-control learned by playing team sports spill over into other areas, for instance sex?

Searching for objective answers, social scientists have conducted many quantitative studies. Typically, they compare random samples of college athletes or fraternity members with similar samples of non-athletes and non-members. The comparisons are based on either self-acknowledged rapes (or self-acknowledged willingness to rape if certain that he would not be punished) or scores on tests that measure “rape myth acceptance,” “attitudes toward women,” “hostile masculinity” and other ideological tendencies that have been found to correlate with rape proclivity. In a meta-analysis of such studies, Sarah Murnen and Marla Kohlman concluded that membership in both male athletic teams and fraternities was associated “to a moderate extent” with attitudes related to sexual aggression and “to a smaller extent with self-report of sexual aggression.”¹⁹⁷ “Hypermasculinity” was the strongest variable to differentiate between athletes and fraternity members and the control groups. It “involves attitudes of sexual callousness, male dominance, and acceptance of aggression.” The value of the effect sizes related to hypermasculinity was “moderate.”¹⁹⁸

¹⁹⁶ *Id.* at 147. Perhaps this vague concept means that as spoiled heroes to other students and fans, they believe that they can escape justice.

¹⁹⁷ *Id.* at 153.

¹⁹⁸ *Id.*

These studies do not reveal whether the harmful attitudes and behaviors that they found were merely associated with, rather than caused by, fraternity membership or participation in organized sports. As Murnen and Kohlman acknowledged, a college athlete usually will have played football, for example, long before entering college.¹⁹⁹ But the methodological problem is deeper than that. Without longitudinal studies we do not know whether a player's violent behaviors began before he played any organized sport. Moreover, his behavior toward women might have been even worse if he had never played football. The common tacit assumption that if he had never played football he necessarily would have resembled the members of the non-athlete control group is fallacious. Perhaps he would have resembled members of a different group: college-age men with equally violent inclinations in childhood who did not attend college or did not play sports. No one has demonstrated that violent athletes are more rape prone than equally violent men of the same age who spend their spare time in other ways.²⁰⁰ Although unwilling to hazard a guess, we would not be surprised if the non-athletes were the more rape-prone of these two groups.

Murnen and Kohlman noted that the need for longitudinal studies is less acute with respect to fraternity membership, since there are no comparable high school organizations. But substance abuse,²⁰¹ lack of empathy,²⁰² aggressiveness,²⁰³ hostile masculinity,²⁰⁴ use of pornography,²⁰⁵ a rotten childhood environment,²⁰⁶

¹⁹⁹ *Id.*

²⁰⁰ Cf. Arrick Jackson et al., *Routine Activity Theory and Sexual Deviance Among Male College Students*, 21 J. FAM. VIOLENCE 449, 456 (2006) (finding males with a history of deviance before college were more likely to be sexually aggressive in college); Thomas C. Hartford & Bengt O. Muthén, *Alcohol Use Among College Students, The Effects of Prior Problem Behaviors and Change of Residence*, 62 J. STUD. ALCOHOL 306, 311 (2001) (high-risk activities often preceded college).

²⁰¹ LALUMIÈRE ET AL., *supra* note 42, at 151–52 (association with rape clear but causal relationship uncertain).

²⁰² *Id.* at 73. A longitudinal study found a strong correlation between certain parenting practices at age five and the child's degree of empathetic concern at age thirty-one. Richard Koestner, Joel Weinberger & Carol Franz, *The Family Origins of Empathic Concern: A 26 Year Longitudinal Study*, 58 J. PERSONALITY & SOC. PSYCHOL. 709, 711 (1990) (paternal involvement in child care and maternal tolerance for dependent behavior significantly predicted the child's empathetic concern at age 31). To exclude the possibility of genetic causation one would want to conduct a comparable study of adoptive parents' children.

²⁰³ LALUMIÈRE ET AL., *supra* note 42, at 92–97.

²⁰⁴ Vanessa Vega & Neil M. Malamuth, *Predicting Sexual Aggression: The Role of Pornography in the Context of General and Specific Risk Factors*, 33 AGGRESSIVE BEHAV. 104, 108, 115 (2007).

²⁰⁵ See generally LALUMIÈRE ET AL., *supra* note 42, at 146–49 (conflicting evidence on pornography's effects).

²⁰⁶ Concerning the multiple factors in childhood that are associated with rape proclivity in later years, see generally *id.* at 93–94.

and a promiscuous obsession with sex²⁰⁷ are all associated with individual rape proclivity and all—even if not innate—are likely to develop before college. One supposes that membership in certain fraternities reinforces any harmful beliefs and practices that its members had developed before college, but as with athletes we do not know for certain whether *the kind of man who chooses to join a sexist fraternity* would have been substantially less rape-prone if he had instead pursued women in his private quarters or at non-fraternity parties or in off-campus bars.

Whatever may be the answers to these questions, our college fraternities do not resemble gatherings of male Puritans, whose leaders strongly disapproved of the coeducation, binge drinking, objectification of women,²⁰⁸ “dalliances,” premarital sex, and the actual or borderline rapes that have blackened the reputation of some fraternities.

Fraternity parties exemplify our hybrid modern culture. Although the political support of fraternities by powerful alumni can be reasonably described as a remnant of patriarchy, rapes after fraternity parties are also due to the decline of patriarchal restrictions on women’s sexuality and drinking.

Feminists urge the non-rapist majority of the men present at these parties to serve as guardians, as of course they should. Beyond that, feminists have created a political environment in which fraternities have a strong incentive to self-regulate in order to ward off efforts to shut them down. Thus, women’s liberation has helped to create but also to publicize and criticize the culture of the worst fraternities. It is unclear, however, whether abolition of fraternities would simply change the sites of coeducational intoxication and rape to dorms or off-campus bars and housing. One study found that when researchers controlled for binge drinking, fraternity men were no more likely to rape than other college men.²⁰⁹

To the extent that a mixture of binge drinking and the search for sex by predatory males and sometimes incautious females leads to rape,²¹⁰ the RAA seems to us a better framework for analysis than the TFA.

²⁰⁷ Some social scientists regard “sexualization”—manifested in several ways—as a leading cause of rape. See generally Bryden & Grier, *supra* note 9, at 200–07.

²⁰⁸ Whatever may have been the private feelings of most Puritan males about the importance of female beauty relative to character, their culture did not encourage overemphasis on beauty as ours does.

²⁰⁹ Mary P. Koss & John A. Gaines, *The Prediction of Sexual Aggression By Alcohol Use, Athletic Participation, and Fraternity Affiliation*, 8 J. IMPERSONAL VIOLENCE 94, 105 (1993).

²¹⁰ There is evidence that a relatively small number of skillful serial offenders are responsible for many college rapes as well as related crimes. The repeat rapists in a large sample of officially undetected (but anonymously acknowledged) student rapists averaged 5.8 rapes each, and most of them committed other acts of interpersonal violence such as battery and child physical and sexual abuse. David Lisak & Paul M. Miller, *Repeat Rape and Multiple Offending Among Undetected Rapists*, 17 VIOLENCE & VICTIMS 73 (2002). Similar results were found in a study of navy recruits. Stephanie K. McWhorter et al., *Reports of Rape Reperpetration by Newly Enlisted Navy Personnel*, 24 VIOLENCE & VICTIMS 204 (2009).

D. Who Benefited from the Puritans' Restrictions on Single Women's Sexual Behavior?

Although we have tried to confine our analysis of rape's causes to factual rather than normative judgments, the two are usually mixed in discussions of the Puritans, if only because terms like "patriarchal" and "double standard" imply that restrictions on female sexuality are both unjustifiable and beneficial to men.

Who benefited from the Puritans' oppressive sexual norms? One can say that the family, which was the foundation of Puritan society, and the husband as its head, were the beneficiaries of Puritan restrictions on non-marital sex.²¹¹ Certainly any violation of the community's norms by his children would have been a challenge to a father's authority and if publicly known would have besmirched his reputation. Equally certainly, the Puritans relied heavily on families and, consequently, husbands to instill and enforce their norms. But that does not explain why any particular community norm existed. Nor does it mean that the norm was necessarily unjustifiable in its time.

Subjectively, those Puritans who believed that their society's sexual norms were based on God's commands can be said to have benefited. The original Puritan settlers were more fervently hostile to fornication than colonists to the south,²¹² yet both were strongly patriarchal, so it seems likely that sectarian beliefs played a role. Although the Puritans' sexual culture served the interests of most husbands, it surely did not serve the sexual interests of single men, nor those of adulterous husbands who were considered to be guilty of the crime of fornication.²¹³

From a rationally selfish point of view, both parents, their children (especially their daughters), and cash-strapped local governments were all beneficiaries of the Puritans' sexual restrictions. Non-marital sex was scandalous and if discovered could lead to prosecution for fornication. But even undiscovered sex was dangerous. Venereal disease appears to have been rare but not unknown;²¹⁴ this risk was enhanced by the unavailability of condoms, at least in rural areas.²¹⁵ But

²¹¹ Cf. NORTON, *supra* note 98, at 38–39, (1996).

²¹² *Id.* at 66.

²¹³ Compared to the potential (though rarely inflicted) death penalty for adulterous wives, a mere fornication conviction was radically preferential treatment. But from the standpoint of a husband with a wandering eye, it was decidedly suboptimal.

²¹⁴ JOHN D'EMILIO & ESTELLE FREEDMAN, *INTIMATE MATTERS: A HISTORY OF SEXUALITY IN AMERICA* 24–25 (2012). Although it appears to have been less common in New England, venereal disease was a serious problem in the South, in some Indian nations and in post-revolutionary Philadelphia, but Godbeer does not mention it in his lengthy discussion of the Puritans' sexual mores. GODBEER *supra* note 100, at 19–116 (Puritans); 178 (Indians); 318 (Philadelphia); 195 (the South).

²¹⁵ One could purchase primitive condoms in the seaport of Philadelphia, where sexual morality was notoriously lax, but Godbeer doubts that rural Pennsylvanians had access to them; presumably the same was true in rural New England. GODBEER, *supra* note 100, at 301

by far the main danger was pregnancy, which was much more perilous than it is today,²¹⁶ with modern contraceptives, obstetrics, and abortions.²¹⁷ Pregnancy was especially dangerous for teenage females; even today, they are fifty percent more likely than adult women to have delivery complications.²¹⁸ Of course, the dangers of childbirth existed for married as well as for unmarried Puritan mothers, but in the marital context they were an unavoidable risk of reproduction, and sex was an essential (and encouraged) feature of the marital bond.²¹⁹

In addition to the physical danger to their daughter, an illegitimate child also created other serious problems for both Puritan parents. Daughters needed parental approval of their marriages.²²⁰ Disapproval might be for any of several reasons: the potential husband's low status, poor character or lack of economic prospects, for example. A shotgun marriage was sometimes the best available option, but it circumvented this screening process. More than that, the putative father often could not afford to support a family; some denied responsibility or even fled town.²²¹

In this as in other matters, husbands were entitled to ignore their wives' advice, but their interests do not appear to have differed much, if at all. Both parents had strong practical reasons to favor premarital virginity, especially for their daughters but to a lesser extent also for their sons, who might be pressured by the community to marry the pregnant mothers of their illegitimate children or prosecuted for fornication or ordered to pay child support.²²²

²¹⁶ See D'EMILIO & FREEDMAN, *supra* note 214, at 25.

²¹⁷ One of the dangers was puerperal fever, a catchall term for infections that are due to unsanitary conditions during childbirth. The etiology of these infections was not understood until the nineteenth century. Although not always fatal, these illnesses could be very serious. It is unclear, however, how often the midwives who delivered babies for the Puritans transmitted such infections from one woman to another. That danger was presumably more acute in urban settings in which one doctor delivered many babies in the course of a single day than in rural villages where midwifery was a part-time occupation. See generally Christine Hallett, *The Attempt to Understand Puerperal Fever in the Eighteenth and Early Nineteenth Centuries: The Influence of Inflammation Theory*, 49 MED. HIST. 1, 13 (2005).

Patriarchal males have not always opposed abortion. A leading authority on abortion in early New England found no evidence of any statutes or case law in Britain or America condemning abortion during the seventeenth century. Dayton, *supra* note 100, at 20 n.3. Abortion policy was (and remains) difficult to analyze by reference to patriarchy, when one recalls that men's sexual and financial interests are often served by an abortion and that male Supreme Court justices created the constitutional right to abortion. *Roe v. Wade*, 410 U.S. 113 (1973).

²¹⁸ This is because the pelvic girdle is not fully widened until about the age of twenty. *Adolescent Pregnancy Fact Sheet*, WORLD HEALTH ORG. (September 2014), <http://www.who.int/mediacentre/factsheets/fs364/en/>.

²¹⁹ See *supra* text accompanying notes 125–26.

²²⁰ KOEHLER, *supra* note 93, at 93.

²²¹ GODBEER, *supra* note 100, at 37.

²²² These stern remedies became less frequent after Puritan values (but not patriarchy) had declined in the eighteenth century. Dayton, *supra* note 100, at 21–22.

Unless someone was willing and able to support the child, the local government would temporarily assume that responsibility until they could place the child with a foster family.²²³ The fiscal problems caused by maintenance of illegitimate children apparently were a serious concern to local governments;²²⁴ no doubt the authorities also wished to provide the benefits of family life to illegitimate children.

Self-denial was characteristic of the Puritan culture, not only for females but also for males and not only concerning sex, but all aspects of their lives. The burden of sexual abstinence fell on young men for a longer period than their female counterparts, since most men could not afford to support a family until their late twenties, while women typically married in their early twenties.²²⁵ If the role of being a sexual gatekeeper was onerous for the unmarried females, the complementary male role of encountering a series of locked gates was hardly a preferable fate. Admittedly, female fornicators were often labeled “whores” and blamed for enticing men into sin.²²⁶ Yet the original Puritan settlers prosecuted male fornicators as vigorously as female ones, and even after the Puritan values began to decline in the late seventeenth century, husbands and wives seem to have been prosecuted together if they obviously had conceived a child before marriage.²²⁷ The greatest burden on Puritan women who engaged in premarital sex was that they, not their male lovers, sometimes became pregnant, a situation that made their guilt of fornication clear beyond doubt, and that was inescapably dangerous in those days. For all their faults the Puritan patriarchs cannot be accused of ignoring that danger.

IV. CONCLUSION

We do not claim to have discovered eternal and universal historical truths about the relationship between patriarchy and rape, but we hope that we have provided a useful alternative to the traditional feminist analysis. Limiting ourselves to the two American cultures that we have examined, these are our conclusions:

²²³ “The usual period for ‘maintenance’ was until a child was six, or until someone offered to take the child into his household as a servant or apprentice.” Mothers, particularly those who were poor, “had little or no say if local selectmen decided that their fatherless child was best bound out to a foster family.” MOFFORD *supra* note 92, at 77. If the patriarchal restrictions on women’s occupational opportunities had not existed, this cruel dilemma might not have been so common, but if the restrictions on non-marital sexuality had not existed, the dilemma would have been more common.

²²⁴ D’EMILIO & FREEDMAN, *supra* note 214, at 5.

²²⁵ See *supra* note 135.

²²⁶ D’EMILIO & FREEDMAN, *supra* note 214, at 18.

²²⁷ See *supra* note 135.

1. Modern American culture is far from being either solidly patriarchal or solidly feminist. As a label, “semi-feminist” (or “a declining patriarchy”) has the virtue of connoting that ours is a transitional culture and that the trend has been toward equality.

2. Contrary to a common assumption, restrictions on single women’s sexual behavior are not, in every culture, beneficial to men in general and harmful to women in general. The Puritans’ harsh restrictions, though they would be abhorrent to most modern Americans, were defensible in their time, as applied to adolescents and to couples who were not engaged. The problems caused by illegitimacy affected wives, daughters, sons and the community, not just patriarchal husbands and community leaders. The sexual frustrations caused by strict obedience to the prohibition of non-marital sex affected single men as severely as women and typically for a longer period because the men had to inherit or earn wealth before they could support a family. The dangers of fornication were much more severe for females than for males, but this was largely due to the inherent risks of pregnancy in the seventeenth century, plus the greater ease of proving the woman’s guilt.

3. Some or all genres of pornography may be one of the causes of rape, and men’s characteristic attraction to impersonal sex is one cause of pornography, but there is no reason to believe that that attraction is more strongly encouraged in patriarchal cultures than in more egalitarian ones. In America, patriarchy fused with religion has been associated historically with suppression of all depictions of sex, including those that are explicit, violent or misogynistic. The sexual revolution, a generally beneficial change that most Americans of both sexes support, seems to have been one of the causes of the modern proliferation of pornography, along with technological advances that have increased the realism, availability, and profitability of the product.

4. Within marriage, women’s liberation from patriarchy is almost certain to reduce sexual coercion. Outside of marriage, women’s liberation is rape-preventive in some ways and rape-supportive in others—perhaps not as much but substantially. That should not be surprising, given that all major social progress has costs. That is true even of such cherished achievements as freedom of speech, democracy, the invention of the automobile, and the Internet.

To some incalculable degree, single men’s propensity to rape must have been inhibited by the Puritans’ theology, their lack of mobility, their close parental supervision, and a large moral and legal buffer zone in which even mild sexuality was treated as sinful and criminal. Men’s access to single women was much more limited than it is today, and the women were much less often vulnerable through intoxication, preliminary consensual sex, or lack of nearby male or female guardians.

5. In several respects the routine activity theory is preferable to the traditional feminist analysis as a framework for analyzing the causes of rape. It eliminates the

three greatest faults of the TFA: its over-emphasis on rapists' supposedly nonsexual motives; its failure to mention the double effect of women's liberation; and its at least tacit downplaying of other important causes of rape, especially those (sexual freedom and gender equality) that might lead to unjustifiable victim-blaming, resistance to feminist reforms, or support for "family values."²²⁸

The most serious weakness of the RAA is that, although its tripartite framework acknowledges the importance of understanding why some men have an above-average propensity to commit a particular crime, RAA studies generally examine closely only "access" and "guardianship."²²⁹ With respect to rape, the RAA studies usually do little to enhance our understanding of why—among the men who have or could obtain access to vulnerable women—some rape but most do not. However, we already possess voluminous studies of that subject, and no doubt there will be many more. The RAA does not exclude insights derived from such studies. The virtue of the RAA is that it exposes relatively neglected portions of the causal web.

6. Some may criticize the RAA because it includes information about rape victims' characteristics that many people rightly or wrongly regard as disparaging. "Victim-blaming" is wrong when it means absolving rapists or tactlessly criticizing an individual victim. But discussions of the effects of victims' behavior on the risk that they will be raped are essential in any scholarly work that purports to summarize the causes of rape. This is true even if the practical value of such works is limited to advising potential victims. Increasingly, social scientists are aware of this.²³⁰

7. We agree with feminists that rape has been much more common both within and outside our universities than most citizens realize. Even so, we regard terms like "epidemic" as at best potentially misleading.²³¹ In the subcultures of college fraternities and male sports, there is substantial though not uniform evidence of moderately greater rape proclivity than in the general college-male population, but this probably varies from sport to sport. The evidence concerning both fraternities and sports is inconclusive without longitudinal studies that might reveal whether the attitudinal and behavioral characteristics of rape-prone athletes and fraternity men were wholly or partly evident before college, perhaps even before adolescence. Be that as it may, the rapes of drunken women that sometimes occur after fraternity parties are best understood as due to a sometimes toxic mix of patriarchal power (the influential alumni), women's liberation (co-education,

²²⁸ See BARON & STRAUS, *supra* note 43.

²²⁹ "Guardian" is a potentially misleading term of art, at least in the context of rape, because careless readers may take it to mean "male protector," though the intended meaning is much broader than that and includes female "guardians" as well as victims' own self-protective behavior.

²³⁰ *E.g.*, Mustaine & Tewksbury, *supra* note 7.

²³¹ See, *e.g.*, Gilbert, *supra* note 190.

heavy drinking with men), and the freedom created by the sexual revolution. (These are causal statements, not allocations of blame or responsibility for reforms).

8. It bears repeating that this article's main purpose has been descriptive, not prescriptive. We do not apologize for that. Agendas for reform—whether progressive or conservative—tend to distort one's perceptions of causes, especially concerning matters about which authors have passionate feelings. Supposedly, our causal analyses lead to our policy proposals, but too often it is the other way around.²³² All of the major flaws of the traditional feminist analysis of rape's causes seem to be due to this human failing.

Evidence that a rule of rape law had patriarchal origins may be valuable, for academic purposes, to a sociologist or historian. The best evidence of patriarchal bias is the rule's lack of a persuasive alternative justification or explanation; its origin in an era when patriarchal males dominated the lawmaking process; its coexistence with other such rules of rape law; its inconsistency with the law concerning one or more analogous issues that arise in contexts where the sexes do not have substantially different perspectives; and its incongruity with the court's or legislature's usual ideological bent, pro-prosecution or pro-defense. In our opinion, these signs were present, to a sufficient degree, with respect to the special rules of evidence for rape cases that have been abolished or modified at the behest of feminists. But for law reform purposes the only question that needs to be answered is the first: whether a different rule would be better.

We have no categorical objection to the idea that even today male biases are sometimes the best explanation for some indefensibly pro-defendant doctrines that originated in more patriarchal eras.²³³ But not every rule that sometimes impedes the prosecution in rape cases is patently inferior to possible alternative rules.²³⁴

In our time, four of the most controversial issues in rape law are the collateral effects of rape convictions (for example, on where a rapist is allowed to live without notification of his neighbors after his release from prison);²³⁵ the affirmative-consent rule; the admissibility of evidence of the accused rapist's prior rapes;²³⁶ and the proper venue and procedures for resolving rape accusations involving college students.²³⁷ All four are difficult problems concerning which

²³² See FELSON & BOBA, *supra* note 74, at 13–18.

²³³ Perhaps, for example, the traditional rule exempting most nonviolent sexual extortion from criminal sanctions. See generally Bryden, *supra* note 10, at 425–56.

²³⁴ See, e.g., *id.* at 355–411, 455, 457–75.

²³⁵ *Id.* at 268–94.

²³⁶ See David P. Bryden & Roger C. Park, "Other Crimes" Evidence in Sex Offense Cases, 78 MINN. L. REV. 529 (1994).

²³⁷ For differing but not wholly incompatible perspectives on the universities' treatment of rape accusations, see JON KRAKAUER, MISSOULA: RAPE AND THE JUSTICE SYSTEM IN A COLLEGE TOWN

both sides have some strong arguments. None of these problems is illuminated by speculation about the patriarchal origins of existing or former legal rules.²³⁸

We have emphasized some positive effects of Puritan culture. We trust that no reader needs to be reminded of the negative effects. It would be as absurd for us to try to recreate their culture as it would have been for them to anticipate ours. Lacking their relatively strong consensus about divine instructions and punishments, their belief in delayed gratification, their isolated, closely-knit villages, their closer parental supervision, and their greater need to avoid the perils of non-marital sex, we could not closely emulate the Puritans, even if we wished to do so, which hardly anyone does.

In modern America, our tacit public policy has been that in cases of conflict gender equality trumps rape prevention. That is, American legislators do not try to reduce the rape rate by prohibiting adult women from engaging in behaviors that increase the risk that they will be raped, not even when the behavior (such as accepting rides from male strangers) is more dangerous for women than for men. The feminist strategy, generally accepted by modern Americans, is to try to reduce the rape rate by regulating the conduct of potential rapists, not potential victims. As a legal matter, we agree with that policy. But a good public policy for rape prevention is not the same thing as good advice to potential victims or a good description of the causes of rape.

Some readers may find these propositions too obvious to mention, but, as Justice Holmes remarked in another context, sometimes “we need education in the obvious more than investigation of the obscure.”²³⁹

(2015); STUART TAYLOR JR. & K.C. JOHNSON, *UNTIL PROVEN INNOCENT: POLITICAL CORRECTNESS AND THE SHAMEFUL INJUSTICES OF THE DUKE LACROSSE RAPE CASE* (2007).

²³⁸ We rarely disagree with Professor Shulhofer’s characteristically sage analyses of rape law, but an exception is his contention that consent to sex is analogous to consent to surgery, which implies that the lack of an affirmative-consent rule (in most states) is a vestige of patriarchal discrimination against rape victims; in our view, there are reasonable arguments on both sides of the affirmative-consent issue, which is not analogous to consent to surgery. Compare Bryden, *supra* note 10, at 402–06, with STEPHEN J. SCHULHOFER, *UNWANTED SEX: THE CULTURE OF INTIMIDATION AND THE FAILURE OF LAW* 271–73 (1998).

²³⁹ Oliver Wendell Holmes, Jr., *Law and the Court*, in *THE ESSENTIAL HOLMES: SELECTIONS FROM THE LETTERS, SPEECHES, JUDICIAL OPINIONS, AND OTHER WRITINGS OF OLIVER WENDELL HOLMES, JR.* 146 (Richard Posner, ed. 1992).